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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 344

BARBARA F. EVANS, Personal Representative
of the Estate of Roy Evans, Deceased, - Petitioner,

versus

GENERAL MOTORS CORPORATION, - Respondent.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA,
EVANSVILLE DIVISION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Evansville, Indiana,
Attorney for Petitioner.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. _____

BARBARA F. EVANS, Personal Representative of the Estate of Roy Evans, Deceased, *Petitioner,*

v.

GENERAL MOTORS CORPORATION, - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit, dated and entered in this case on April 15, 1966.

CITATIONS TO OPINION BELOW.

The District Court filed no Opinion. The Opinion of the United States Court of Appeals for the Seventh Circuit is printed in Appendix Exhibit "A", pages .. to .., and is reported in 359 F. 2d 822 (West's Advance Sheets).

JURISDICTION.

The Judgment of the Court of Appeals was entered on April 15, 1966. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED.

1. Whether plaintiff's rights to trial by jury as guaranteed by the Indiana Constitution and the Constitution of the United States were denied by the dismissal of her claims against defendant where it does not appear beyond a doubt that the plaintiff cannot prove any set of facts in support of her claims which would entitle her to relief.

2. Whether plaintiff's rights to trial by jury as guaranteed by the Indiana Constitution and the Constitution of the United States were denied by the Court's determining factual issues and the failure to submit factual issues to a jury for determination.

3. Whether the manufacturer of an automobile owes consumers the duty of exercising ordinary care in the design and testing of the design of its automobiles.

4. Whether the manufacturer's duty to a consumer under Indiana law is determined from the relationship between the parties or from the specific facts presented by each individual case.

5. Whether plaintiff's complaint states a claim for relief under Indiana law on the theory of negligence in the design and the testing of the design, and/or

liability for damages caused by breach of implied warranty, and/or the theory of strict tort liability.

6. Whether the Court below erroneously interpreted and applied Rule 8 of the F.R.C.P. by refusing to accept as true all facts well pleaded and the legitimate inferences to be derived therefrom because plaintiff failed to allege certain facts in detail where (a) no motion to make more specific, definite and certain was requested for such facts, and (b) the omitted facts and contentions are outside the issues and theories of plaintiff's claims..

STATEMENT OF THE CASE.

This diversity action was brought to recover damages for the wrongful death of Roy L. Evans, on behalf of his widow and four dependent minor children, as a result of defendant's alleged negligence in the design of his 1961 Chevrolet stationwagon, as alleged in Count I, R. Appendix, pages 3-8, of its breach of implied warranty, as alleged in Count II, R. Appendix, pages 8-10, and in strict tort liability, as alleged in Count III, R. Appendix, pages 10-12. The trial court entered judgments sustaining the first defense of Count I, the first defense of Count II, and the defendant's Motion to Dismiss Count III, each Count being dismissed upon the grounds that each failed to state a claim against the defendant upon which relief can be granted.

Facts—Pleadings.

Plaintiff's Amended Complaint is set forth in the Record Appendix at pages 3-12 and will therefore not here be reprinted.

The allegations of plaintiff's complaint may be summarized as follows:

The defendant General Motors manufacturers and designs the Chevrolet line of automobiles. In the design of the 1961 Chevrolet Stationwagon defendant omitted frame rails located outside the driver and occupants, and incorporated in the design of the automobile what is known as an "X-frame." This type of automobile frame does not have side rails as it is in fact in the shape of an "X." Decedent, Roy L. Evans, was the owner of such a General Motors' designed stationwagon. While driving his automobile, it was struck in the left side by another automobile during an intersectional collision. Decedent received fatal injuries when the left side of the automobile collapsed into and against his body and there was no outer frame protecting him from such a side impact collision, and the "X-frame" with the absence of frame rails located outside the driver permitted the collapse of the body of said stationwagon into his body.

Plaintiff further alleges that the automobile's involvement in a collision was a foreseeable emergency. That the defendant General Motors had knowledge, either actual or constructive, that by omitting side frame rails it was creating an unreasonable risk of harm to the automobile occupants.

Plaintiff further alleges that the automobile should have had a frame providing reasonable protection in the event of a collision of the type used by General Motors and other automobile manufacturers. Attached to plaintiff's complaint and marked Exhibit "A" was a Ford Motor Company ad, reproduced in this Petition at page 7. That a proper frame would have incorporated side rails located outside the automobile occupants.

Plaintiff further alleges that defendant was negligent in the use of the "X-frame" in failing to test the design and in not affording a reasonable amount of safety to the decedent in the event of a collision, all of which proximately caused his death.

The allegations of Count I which are summarized above were, in part, restated in Counts II and III, together with the addition of allegations necessary to establish causes of action for breach of implied warranty and strict liability in tort.

Facts—Evidence That Supports Plaintiffs Theories of Liability.

Since plaintiff was denied the right to trial by jury of her claims there is no evidence in the record. But since the question before this Court is whether plaintiff could prove any set of facts in support of her claims which would entitle her to relief, we here briefly set forth some facts which are available in printed form. Plaintiff is precluded from here presenting discovery evidence, including deposition testimony and interrogatories and answers thereto, the opinions of experts in

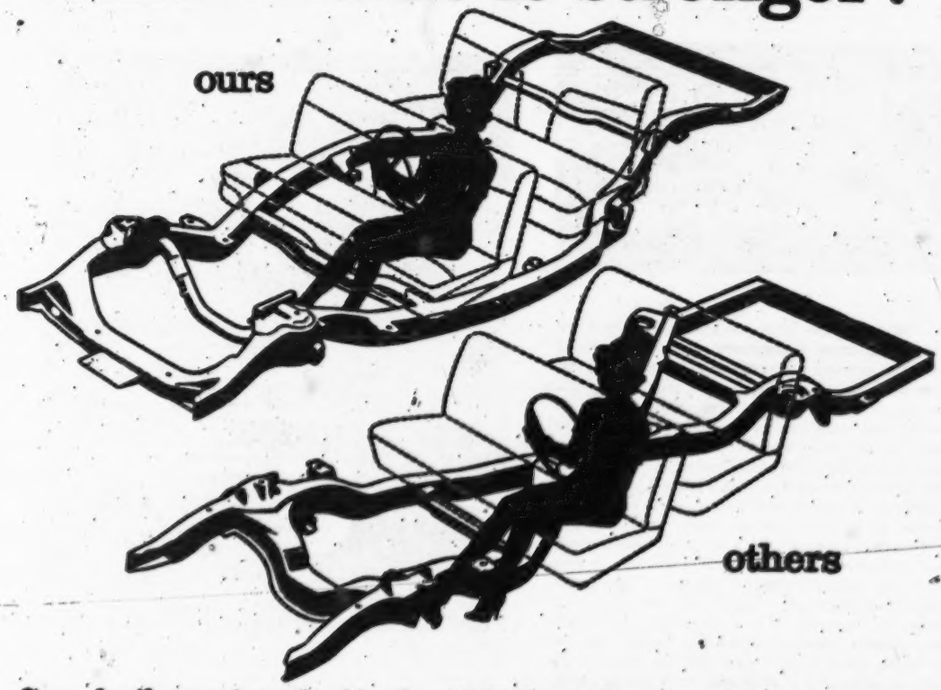
the design and construction of automobiles, crash injury experts, the testimony of witnesses to the collision, and the automobile, all of which plaintiff would offer into evidence at the jury trial.

The theories of plaintiff's claims are evidenced, in part, by the aforementioned Exhibit "A" attached to her complaint as shown on page 7 of this Petition. This particular Ford Motor Company ad was published on page 7 of the June 1961 Popular Mechanic magazine.

Plaintiff's theories are further supported by a visual comparison with frames defendant General Motors, and other manufacturers (Ford), used in automobiles manufactured prior to the design and manufacture of the decedent's automobile. Plaintiff in rhetorical paragraph 12 of her complaint alleged that in the years 1959, 1960 and 1961 defendant was using a perimeter frame which incorporated guard-beam frame rails located outside the automobile's occupants in another line of automobile which it manufactured. On page 9 of this Petition, we have reprinted a page from a 1959 Oldsmobile style pamphlet which pictures two views of the 1959 General Motors Oldsmobile frame which is a "perimeter frame" that also incorporates an "X" member in its design. This Court should note, and we have emphasized in red, the important aspects of this exhibit and that the defendant General Motors in *1959* stated that these Oldsmobiles were so constructed that the frame provided:

> "Solid steel side rails provide added protection against impacts on the body sides."

Which frame is stronger?



Guardrail construction in the 1961 Ford Family of Fine Cars has greater rigidity, offers the strength of strong side rails.

Ford Motor Company builds better bodies

• Millions of car frames are shaped like an "X." Weak in the middle, they lack the strength of strong side rails. Guardrail frames in Ford and Mercury curve out. They are strong in the middle. Guard rails also protect passengers in the unitized bodies of Falcon, Thunderbird, Comet and Lincoln Continental.

• In the Ford Family of Fine Cars, the most vulnerable underbody parts are galvanized, zinc-coated to protect them against rust and corrosion.

• Doors in our cars are stronger. They are reinforced with steel beams. This means they are more rigid and therefore close tighter and quieter, reducing the likelihood of developing squeaks and rattles.

• One reason for the unusually quiet ride in the Ford Family of Fine Cars is the soundproofed floors. Where other cars have only two layers of sound insulation, our cars have three layers of sound insulation. Each layer eliminates a different range of sound from rumbles to squeaks. As a result, very little noise gets through to the passenger compartment.

These are 4 of the many reasons we think you will find (upon comparing our cars with other cars) that Ford Motor Company builds better bodies.

Ford

American Road, Dearborn, Michigan

FORD · FALCON · THUNDERBIRD · COMET · MERCURY · LINCOLN CONTINENTAL

Chassis weakness in some modern cars

IN DISCUSSING the 1959 automobiles in the April 1959 BULLETIN, Consumers' Research pointed out that in many respects the 1959 cars were less safe than previous models and particularly directed attention to the frame designs, some of which had been changed in drastic fashion in order to provide means for increasing the headroom in the "low silhouette" cars. We noted that the X frame design shown in Figure 1, as used by Cadillac, Chevrolet, and Pontiac, was sufficiently strong to support the car body and passenger weights satisfactorily but that it afforded much less protection for passengers than the frames with side rails, as seen in Figure 2. Side rails often help protect the driver and passengers from injury in the event of a sidelong collision, which is a common kind of collision or impact (as, for example, when a car slides sidewise into a wall, pole, or post, in a skid or spin, or is struck amidships at an intersection by a careless driver coming in from a side road, or trying to beat a light).

Figure 1

The "X"-type frame used by Chevrolet, Pontiac, and Cadillac; this design of frame is considered less desirable than others from the standpoint of safety of driver and passengers.

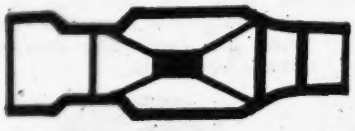


Figure 2

Most makes of cars have a frame with side rails similar to that shown directly above. Exceptions to this type are Cadillac, Chevrolet, and Pontiac, and cars with unit body frames.

Wide World Photos

The picture above, which appeared recently in newspapers served by the Associated Press, illustrates very forcefully the weakness of the X-type of chassis frame. The driver lost control of the car on a slippery road, and the car, a *Chevrolet Impala*, struck the tree broadside with the result that the car was broken into two parts. The frame fractured at the "intersection" of the X.

Had this car been equipped with a conventional chassis construction, with side rails, it is extremely unlikely that the impact would have broken the frame; in many similar accidents in the past, few if any cases have been seen with the astonishing type of failure illustrated in the accompanying photo. We believe this is but one of many ways in which automobile manufacturers give more weight than is warranted to considerations of minor importance (a "low profile," in this instance) oftentimes at the cost of reductions in the effectiveness of safeguards that would serve to protect the driver and passengers in the event a collision or upset occurred.

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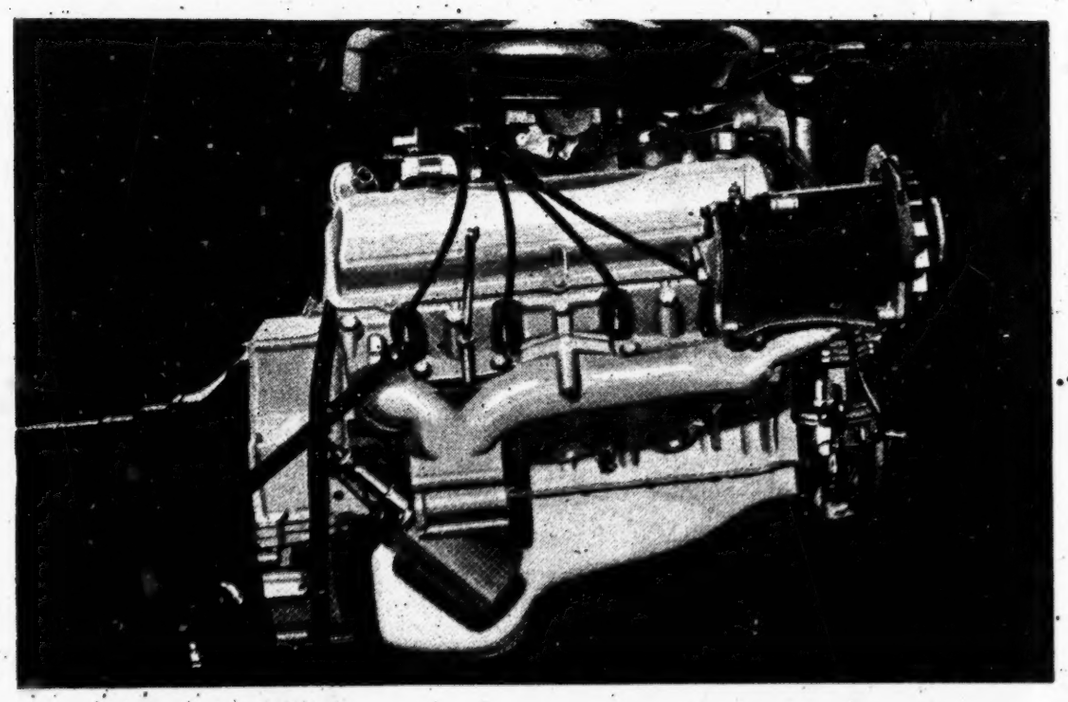
Advanced "RIDE ENGINEERING"

A MASTERFUL BALANCE OF ENGINE AND TRANSMISSION... SUSPENSION AND STEERING ...FOR YOUR COMFORT AND SECURITY

Out of Oldsmobile's continuing search for new and better ways to engineer an automobile have come many trend-setting developments. For 1959, advances have been made in every component of Oldsmobile's chassis and power team. What's even *more* important to you is that each individual design improvement has been made with careful attention to its effect on the whole. The result of this "Ride Engineering" is a smoother, quieter, more responsive automobile . . . with an exceptionally "solid" feel. You are invited to try Oldsmobile's unique "Glide" Ride.



RUGGED NEW ROCKET ENGINE ...quieter, more powerful than ever!

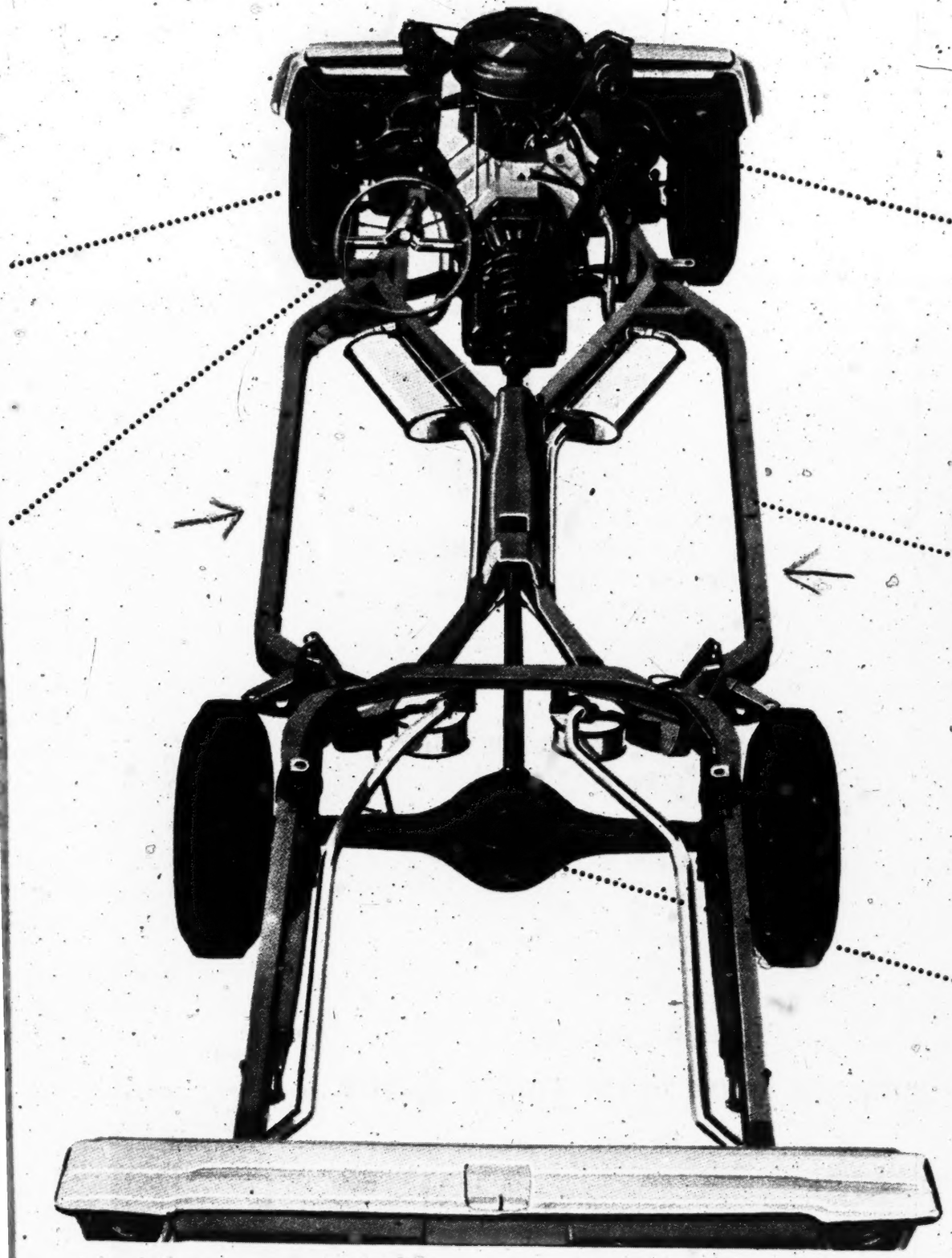
Oldsmobile's new Rocket Engine for Ninety-Eight and Super 88 models (see below for specifications of Dynamic 88's Rocket Engine) brings you the most extensive engine advances in a decade! The 1959 Rocket is bigger . . . features larger cylinder bores, increased displacement. It produces a husky 315 h.p., 435 lb.-ft. torque. And does it more efficiently than ever. New Free-Flow intake manifold design, larger intake valves and a new fuel-saving automatic choke give the thrift-famous Rocket even greater gas economy. It's a smoother, quieter Rocket, too! Olds engineers lengthened the cylinders to give greater piston support, added new conical valve springs for quieter valve operation, designed the most rigid crankshaft and block in the industry.

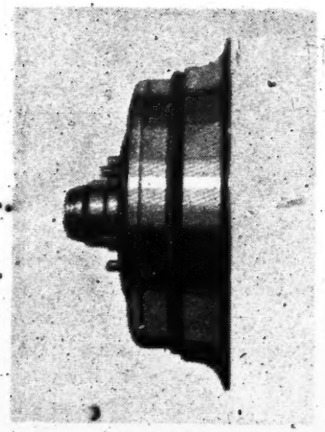
ADVANCED JETAWAY HYDRA-MATIC

Geared for go! Jetaway's positive gearing gives you alert performance . . . maximum efficiency and economy at every speed. New Jetaway, with its two fluid couplings and improved clutches, gives smooth-as-silk shifting through every gear. And lever-type selector makes gear selection as simple as the flick of a finger.

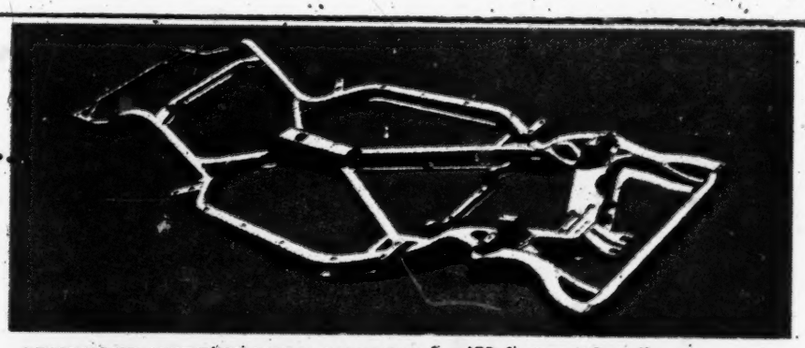
ENGINE DATA—*Ninety-Eight and Super 88 series: 394 cu. in. Rocket Engine with 315 h.p., 435 lb.-ft. torque, 9.75-1 compression ratio and Quadri-Jet Carburetor is standard.*

Dynamic 88 series: 371 cu. in. Rocket Engine with 270 h.p., 390 lb.-ft. torque, 9.75-1 compression ratio and Econ-o-way *Carburetor is standard. Quadri-Jet Carburetor optional at extra cost.*





NEW AIR-SCOOP BRAKES ON ALL FOUR WHEELS— New, cooler-running Air-Scoop Brakes add many miles to brake lining life! Newly designed brake drum flange has 88 square inches more metal area to help dissipate heat . . . also acts as an air scoop, directing cool air across the brakes! Larger wheel cylinders reduce braking effort.



ADVANCED WIDE-STANCE CHASSIS for '59 features the all-new Guard-Beam Frame . . . the strongest, most stable frame in Olds history! It combines heavy U-channel and box-member side rails with a huge center X-member. Body is mounted directly to the nine-inch wider frame, reducing vibration for a smoother, quieter "Glide" Ride. Solid steel side rails provide added protection against impacts on the body sides. New king-pin angle improves cornering and wheel-return after turning . . . also reduces "wheel-fight" due to road irregularities. Wider front and rear tread and spring base give added resistance to sidesway.

ADVANCED ANTI-SPIN REAR AXLE picks a sure-footed path through ice, snow, mud or sand. Instead of feeding power to the wheel that's spinning, it transfers power to the wheel with the grip.

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Defendant in its 1961 Oldsmobile style pamphlet, also recognized the frame as a safety feature in the design of its Oldsmobile:

> ". . . Oldsmobile's Guard-Beam Frame gives the car strength to spare . . . gives *passenger safety in reserve! Box-section steel members form the frame sides and extend their protective strength from end to end. These husky rails act as steel barriers at the sides of the seat to give you maximum protection all around. You ride cradled within the frame!"* (Our emphasis.)

An article appearing in the November 1959 CONSUMERS' BULLETIN is reprinted in this Petition in full on page 8. It would be offered as evidence that defendant knew or should have known of the claimed defect in 1959 or soon thereafter.

There is evidence from General Motors' publication "THE AUTOMOTIVE EXAMINER," which demonstrates that defendant admits that there is greater strength and protection in the Oldsmobile perimeter type frame than the frame incorporated in some other General Motors' lines. In boasting of the advantages of the Oldsmobile perimeter frame and comparing the disadvantages of other General Motors' automobiles, the defendant on various occasions wrote:

> *Chevrolet*—"Jetstar 88's *Guard-Beam Frame* with sturdy side rails and torque-box construction offers *sturdy protection* and provides a firm foundation for a smooth, quiet ride." Impala's X-type frame does not have side rails or torque-box construction." (Our emphasis.)

Buick — "Jetstar 88's have a Guard-Beam Frame that offers stability, through rigidity, and *added protection with rugged side rails;*" and, "Oldsmobile's exclusive Guard-Beam Frame helps provide a sturdy ride and the *extra margin of protection that goes with a perimeter type frame.* Buick uses the X-type frame;" and, "Oldsmobile's Guard-Beam frame rings the passenger compartment with a steel perimeter which provides protection and gives the body rugged support at the sides." (Our emphasis.)

Cadillac—"The Oldsmobile has a strong, sturdy Guard-Beam Frame which not only provides the foundation for an unusually quiet, smooth side but *extra perimeter protection as well.* Cadillac uses an X-type frame." (Our emphasis.)

Additional evidence was set forth in plaintiff's Brief filed with the U. S. Court of Appeals and may be found on pages 4 to 24, 38, 39-41, 44-45, 48-50. Because the Appendix and Brief filed with the U. S. Court of Appeals for the Seventh Circuit were bound in one volume this material is also on file with the Clerk of this Court.

REASONS FOR GRANTING THE WRIT.

1. The majority opinion of the Court below adversely decides to this Petitioner a question of great national significance, erroneously under Indiana law, in contravention of decisions of the Indiana Supreme and Appellate Court and other U. S. Circuit Courts of Appeal and U. S. District Courts, and of this Court.

The importance of the decision and the need for review here should not be underestimated. Judge Kiley in his dissent demonstrates a clear recognition of the importance of the problem.

President Lyndon B. Johnson, in a Whitehouse Press Release on February 2, 1966, stated:

> "You and I know that the gravest problem before this nation—next to the war in Viet Nam—is the death and destruction, the shocking and senseless carnage, that strikes daily on our highways and that takes a higher and more terrible toll each year."

That in excess of 45,000 people a year are killed in traffic accidents, and more persons are killed and injured each year than in all the wars in which our Country has been involved is evidence of the importance of this litigation.

It is respectfully submitted that this litigation is of importance to the Country as a whole, to the residents of Indiana, and, of course, to this plaintiff and her minor children. One only has to look to the Indiana highway fatality statistics in the period 1961 to January 1966 to find the following horrifying figures:

40 Hoosiers died fighting in Viet Nam yet in only three summer holidays in 1965, 61 were killed on Hoosier highways; this Country had had 3,662 deaths in Viet Nam but Indiana alone had 7,316 casualties on its highway. Evansville Press, July 1, 1966.

The cause of all injuries and deaths was for years assumed to be the result of the negligent operation of the vehicle on the highway. Research has revealed that it is not the impact between the two vehicles and/or object that causes the injury and/or death, but it is the impact between the vehicle, occupant, and the vehicle interior or some other object which causes the damage. This is the so-called "second accident." KATZ, *Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars,* 69 Harv. L. Rev. 863, 868.

Professor James J. Ryan, Director, Automotive Safety Research Project, Professor of Mechanical Engineering, University of Minnesota, in an article entitled "Reduction in Crash Forces," estimates that through engineering and design changes in American automobiles, the yearly injury and death totals could be reduced about one-half. FIFTH STAPP CONFERENCE, page 48.

The majority opinion below would, among other things, remove from the tort law the duty to exercise ordinary care in the design and testing of the design of automobiles for defects which would only occur during a collision. Although more than one-fourth of all automobiles are at some time during their use involved in an accident producing injury, O'CONNELL, "Taming

the Automobile," 58 Northwestern L. Rev. 299, 348, and a large percentage of these collisions represent side impact collisions, *Traffic Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce House of Representatives, 84th Congress, Second Session,* page 908, the Court below would relieve defendant from liability even where it was creating an unreasonable risk or harm to consumers.

This litigation, defendant would argue, presents a new and novel theory of liability that would require it to be an insurer of all auto accidents. The "Failsafe" principle is not of origin in this case. See: O'CONNELL, "Taming the Automobile," 58 Northwestern L. Rev. 299, 348. The restraining factor in this litigation may be found in plaintiff's theory of liability which seeks recovery because of the unreasonable risk created by defendant. Liability under such circumstances would not make defendant an insurer.

To extend "crashworthy" engineering principles to the consumer would only reflect the true nature of the common law. Nonliability and the denial of the right to trial by jury are at variance with the modern day needs of the consumer.

2. The decision is in conflict with applicable State law and deprives plaintiff of the right to trial by jury in violation of both her Indiana and United States Constitution guarantees.

The law is well-settled that on a motion to dismiss as applicable to the Third Count of plaintiff's complaint and the first defense to Counts I and II of plaintiff's complaint, each of said defenses and motion presenting the question that plaintiff's complaint fails to state a claim, the Court should assume the truth of all the allegations in the complaint; and the complaint should not be dismissed unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of her claim which would entitle her to relief. *Conley* v. *Gibson,* 1957, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80.

It is Hornbook and Indiana Law that the elements of a cause of action for negligence are: (1) a relationship between the parties such that the actor has a duty toward the plaintiff, (2) a breach of that duty by some act of negligence, (3) which proximately causes, (4) damage to the plaintiff. Negligence is a matter of risk of recognizable danger of injury. Defined as "conduct which involves an unreasonably great risk of causing damage" or as conduct "which falls below the standard established by law for the protection of others against unreasonably great risk of harm." *McCloud* v. *Leavitt Corporation,* D. C. Ill., 1948, 79 F. Supp. 386, 291; PROSSER ON TORTS, Second Edition, page 119; HARPER & JAMES, THE LAW OF TORTS, Volume 2, Section 16.9, pages 928, 929.

The common law aspect of this controversy is, of course, under the doctrine of *Erie R. Co.* v. *Thompkins,* 1938, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, covered by the substantive law of Indiana.

Under the Indiana Bill of Rights, it is provided, in part, in Article 1, Section 12: ". . . Every man for injury done to him in his person, property, or reputation shall have remedy by due course of law," and, in Article 1, Section 20: "in all civil cases, the right of trial by jury shall remain inviolate."

The effect of the decision of the Court below sustaining the dismissal of plaintiff's claims deprives this plaintiff of the right to trial by jury just as surely as the sustaining of a directed verdict. In the latter instance at least the Court has permitted the plaintiff to introduce evidence in support of her claim.

The Indiana Courts have repeatedly held that because of the above constitutional right to trial by jury, "The law very zealously protects one against whom a motion for a directed verdict is addressed . . . ." *Estes* v. *Anderson Oil Company,* 1931, 93 Ind. App. 365, 176 N. E. 560. In *Bradford* v. *Chism,* 1963, 134 Ind. App. 501, 186 N. E. 2d 432, and *Coleman* v. *Mitnick,* 1964, —— Ind. App. ——, 202 N. E. 2d 577, 578, citing with approval the holding in *Garr* v. *Blissmer, et al.,* 1961, 132 Ind. App. 635, 177 N. E. 2d 913, which interpreted the Constitution as placing: ". . . a heavy restraining hand upon the Courts to deny the submission of a cause brought in good faith and based upon a situation involving far reaching and serious consequences to the plaintiff."

The Court should be just as willing to protect the parties' rights to trial by jury at the pleading stage as it is at the directed verdict stage, and what can be said as to protecting a parties' rights and directing a verdict should apply equally to a ruling on a motion to dismiss.

(a) The Court below fails to follow Indiana law in determining the duty defendant owed to the decedent consumer from the relationship between the parties.

Duty arises out of the relationship between the parties under Indiana Law and is in no way dependent upon the factual basis of the litigation. The application of a different method for determining the manufacturer's duty in this case creates a conflict between the result that could be expected to be obtained in a State court and the result obtained in this diversity proceeding.

Defendant admits, and the Court below recognizes some duty was owed to the decedent consumer. We submit that under Indiana law and the holding in *Union Traction Co.* v. *Berry,* 1919, 188 Ind. 514, 520, 121 N. E. 655, 32 A. L. R. 1171, a jury question was thus presented. Duty arises out of the relationship. Plaintiff needed to show nothing further than relationship to satisfy the duty requirements.

The Court clearly held that the only legal question for a Judge to decide is the relationship between the parties. Once the duty to use care is established then the Court must leave to the jury the question of whether the conduct of the defendant measured up to ordinary

care. Because of the importance of this holding and the error of the Court below in failing to follow same, we quote extensively here below:

"The law requires nothing more than duty; it will excuse nothing less. *The duty to exercise care for the safety of another arises as a matter of law out of some relation existing between the parties,* and it is the province of the Court to determine whether such a relation is shown as gives rise to such duty. In determining whether the relation shown gives rise to a duty to use care, the Court decides a pure question of law. This question cannot be submitted to a jury. *Where a duty to exercise care exists, it is always the same regardless of the nature of the relation out of which it arises. It cannot be said that the duty to use care which arises out of the relation of carrier and passenger differs in kind, character, or degree from the duty which arises out of the relation of master and servant, or out of any other relation which imposes the legal duty to use care."* (Our emphasis.)

"In submitting the determination to a jury of a question of negligence, which is a mixed question of law and fact, the court is required to define the duty which the law imposes. *This duty is defined by the law as 'due care', 'ordinary care', or 'reasonable care,'* which terms are regarded by the courts as having the same significance. It is also the duty of the court to state the rule fixing the standard of care which will measure up to the duty imposed by law. *The court should then leave it to the jury to decide whether the acts and conduct of*

the defendant in respect to the matter before the court measures up to the standard of care fixed by the law. . . ."

In *Belt, etc. Co.* v. *McClain,* 58 Ind. App. 171, 176, 106 N. E. 742, it is again emphasized that duty arises from the relationship of the parties. The Court stated:

> "Where an act is alleged to have been negligently done or negligently omitted, the conditions and circumstances under which it was done or omitted are not necessary in a pleading for the reason that it is not the province of the court to judge from study conditions and circumstances whether ordinary care required the act to be done or omitted. That is the peculiar province of the jury. The duty to use care in favor of appellee being shown, it is sufficient to charge that the acts or omissions specified were negligently done or omitted. The general duty to use care in favor of the plaintiff which arises as a matter of law from the relation between the parties as shown by the complaint is broad enough and comprehensive enough to include every specific act that ordinary care requires in the discharge of such duty. When the general duty to use care is shown an allegation that ordinary care required the performance of a particular act is sufficient to bring such act within the scope of the general duty imposed by law. An allegation that an act was negligently done or negligently omitted is equivalent to an allegation that the defendant failed to exercise ordinary care in the discharge of this duty."

The contention by counsel that there is no duty conflicts with the testimony of defendant's President

James M. Roche before Congress on March 22, 1966, before the Subcommittee on Executive Reorganization of the Committee on Government Operations, United States Senate. President Roche testified, in part:

> "Without straying too far from the purposes of today's hearings, I do want to stress that GM is expanding its research, engineering and testing in all areas of safety, including that of the 'second collision' and the causes of both accidents and injuries. We are stressing safety in our advertisements and consumer contracts, and adding new safety features to our cars as fast as they can be effectively developed, carefully tested and thoroughly proven to be practical. We are in every other way devoting more time, imagination, attention, manpower and statistical studies than ever before to this all-important safety factor. We are in short, in all our plans and calculations, giving safety a priority second to none. *And we consider this to be our duty.*"

The defendant General Motors admits in its pamphlet, DESIGN FOR SAFETY, page 2, that automobile safety involves the car, the driver, and the road and that "The manufacturer's purpose is to produce a safe car." The defendant further states:

> "Cars must be—and are made as safe as possible with existing knowledge and practical limitations. Since the early days of the automobile the objective has been to make a car move—and to make it move safely. That is true today. *Safety is a major objective of General Motors in the de-*

sign, manufacture and testing of its car, and will always remain so.

"Some things are put on cars as specific safety features—seat belts, padded interors, etc. *Important as they are, these sometimes obscure the fact that they would be of little help—or at the least of less help if the structural integrity of the car itself did not provide durability, reliability, and safety. Safety does not arise by adding 'safety' items to a car, instead of building safety into it originally.*" (Our emphasis.)

And, at pages 29-30, defendant further states:

"The first all steel body gave passengers protection against far more than just the weather. Strong tough steel afforded more protection against impact forces. Passengers were incased in steel front and back, both sides, roof and floor."

In another General Motors pamphlet, Statements by General Motors Corporation before the Michigan Senate Highway Committee, page 35, defendant's representatives testified:

"As in the past, our (General Motor's) future efforts will have a dual objective. First, to design products which have a high degree of build-in safety and characteristics to provide drivers with a high capability of avoiding accidents. Second, to design products which prevent or minimize injuries in the event an accident does occur."

(b) The decision in this diversity action is contrary to applicable state law and is in conflict with decisions of the Federal Court's interpretation of Indiana Law.

The classic opinion of Judge Cardozo written sixty years ago is the law of Indiana. Subsequent to the *MacPherson* case, every decision of the Indiana Appellate or Supreme Courts has followed in reasoning in the *MacPherson* case. *J. I. Case Company* v. *Sandefur,* 1964, ____ Ind. ____, 193 N. E. 2d 647, 197 N. E. 2d 519; *Coca-Cola Bottling Works of Evansville* v. *Williams,* 1941, 111 Ind. App. 574, 37 N. E. 702; *Holland Furnace Co.* v. *Nauracaj,* 1938, 105 Ind. App. 574, 14 N. E. 2d 339. The Wisconsin Supreme Court recognized its applicability in Indiana in *Wojciuk* v. *U. S. Rubber Co.,* 1961, 13 Wis. 2d 173, 108 N. W. 2d 149.

The decisions of other jurisdictions and the reference to the *Restatement of the Law of Torts, Second,* Sections 395 and 398, cited by Judge Kiley in his dissent show that the majority below failed to follow not only controlling Indiana law, but also failed to follow in the mainstream of the law of products liability in this country.

Judge Schnackenberg's opinion in *Elliott* v. *General Motors Corp.,* CCA 7th, 1961, 296 F. 2d 125, was cited approvingly by the Indiana Supreme Court in *J. I. Case* v. *Sandefur, supra.*

The late Judge Lindley wrote in *McCloud* v. *Leavitt Corp.,* DC Ill. 1948, 79 F. Supp. 286, 291:

> ". . . As I have said, in a tort action as I think the Indiana Courts now look at it, the ques-

tion is . . . whether plaintiff has charged negligence which it might reasonably have been foreseen, would naturally and probably result in injuries to third persons . . ."

The trial judge in *Dagley* v. *Armstrong Tire and Rubber Co.,* CCA 7th, 1965, 344 F. 2d 245, tried to a jury plaintiff's claim for negligent design of a tire.

Under Indiana law, even where there is no duty if the defendant undertook to provide additional protection against impact on the body sides (such as shown by the Oldsmobile ad), having undertaken so to do it is liable for the damages sustained on account of its failure to exercise reasonable care. *Robertson Music House* v. *Wm. H. Armstrong Co.,* 1929, 90 Ind App. 413, 415-416; and *Hamilton, Exr.* v. *Feary,* 1893, 8 Ind. App. 615, 35 N. E. 48, 52 Am. St. Rev. 485.

Hand in hand with the duty to exercise ordinary care in the design of the automobile is the duty to test the design. What has been said relative to design duty is likewise applicable to the duty to test the design. It is shocking to think that automobiles could be manufactured by the defendant without any tests for design created defects and yet there would be no liability under holding of this case.

With the relationship established, the adoption of the *MacPherson* rule in Indiana, the holding of other Circuits as cited in Judge Kiley's opinion, the public admissions of defendant's representatives, and the *Restatement of the Law of Torts, Second,* Section 395, including subsections (j) and (k) and Section 398, there is an abundance of evidence that the Court below

has erroneously decided a factual question which should have been submitted to a jury, erroneously decided in conflict with Indiana law that an automobile manufacturer does not have to exercise ordinary care in the design and manufacture of an automobile, and has denied plaintiff the right to trial by jury.

3. Petitioner was further denied her constitutional rights to trial by jury by the Court below deciding questions of fact.

Under Indiana law the jury is the exclusive judge of all questions of fact. 28 *Ind. L. Ency., Trial,* Section 111. An examination of the Opinion of the majority of the Court below establishes that not only would the Court reach a factual decision in arriving at its interpretation of the duty owed to the decedent but the Court by its decision withdrew from the juries consideration the factual issues as to negligence, contributory negligence, foreseeability, proximate cause, whether decedent's use of the automobile was ordinary or an emergency use which could have been reasonably anticipated, and whether defendant created an unreasonable risk.

Plaintiff in *Meyer* v. *Greenwood, et al.,* 1955, 125 Ind. App. 288, 124 N. E. 2d 870, 872, sued in three counts: common law negligence, breach of implied warranty, and violation of Indiana Statutes concerning adulterated foods. Plaintiff contracted trichinosis from eating pork purchased from defendants. Whether plaintiff had properly cooked and used the pork was held to be a question of fact for the jury. The Court

further held that if there were any limitations as to the defendant's implied warranty, it would be necessary for defendant to plead same by an answer.

In DILLARD AND HART, *Product Liability: Directions for Use and the Duty to Warn,* 41 Va. L. Rev. 145, 162 (1955), the authors state:

> "To assert that the manufacturer is responsible for damages done only when the product is used in the ordinary and expected manner is simply another way of saying that he is liable only if it is foreseeable that the article will be used in a dangerous way."

The Indiana Appellate Court in *S. I. G. & E. Co.* v. *Caine,* 1964, —— Ind. App. ——, 98 N. E. 2d 14, 18, the Court held that foreseeability was a question "upon which the jury was entitled to pass."

Contributory negligence is a question of fact for the jury. *King's Indiana Billiard Co.* v. *Winters,* 1952, 123 Ind. App. 110, 119; 106 N. E. 2d 713. (Case includes citations to numerous authorities.)

In *Tabor* v. *Continental Baking Co.,* 1941, 110 Ind. App. 633, 38 N. E. 2d 257, 261, the Indiana Appellate Court held: "What is the proximate cause of an injury is ordinarily a question of fact for the jury."

The automobile manufacturer's design duty to a consumer was said to include, in *Davlin* v. *Henry Ford & Son, Inc.,* CCA 6th, 1927, 20 F. 2d 317, 319:

> "Its duty . . . to use reasonable care in employing designs . . . which would fairly meet any emergency of use which could reasonably be anticipated."

In *Kahn* v. *Crysler Corporation,* DC Tex, 1963, 221 F. Supp. 677, 679, the Court defined the extent of automobile manufacturer's duty:

> "The duty of the automobile manufacturer extends to the ordinary use of the vehicle, and may even be such as to cover certain situations when the automobile is being negligently used."

The manufacturer's duty included the duty to design the product so that it will meet "emergency use" which could be reasonably anticipated. *Halpern* v. *J. A. D. Construction Corp.,* 1960, 27 Misc. 675, 202 N. Y. S. 2d 945.

In *Hardman* v. *Helene Curtis Industries, Inc.,* 1964, 48 Ill. App. 2d 42, 63, 198 N. E. 2d 681, 691, the Court held:

> "the essential question presented by a claim of breach of implied warranty of merchantability is whether the product failed to safely and adequately satisfy the uses to which such products are ordinarily put.
>
> ". . . *the question of ordinary use is as much a question of fact as is the question of what is a foreseeable use.*" (Our emphasis.)

Plaintiff claims Count I rhetorical paragraph 9 alleges the foreseeability by the defendant General Motors of a side impact collision as described in plaintiff's complaint and that "drivers would be seriously injured and/or killed *because* of the absence of frame protection and the seating of the driver outside the 'X-Frame.'" In rhetorical paragraph 10 plaintiff

alleges that defendant had knowledge that it was creating an "unreasonable risk of causing substantial bodily harm and/or death to persons driving the automobile by not having reasonable and adequate frame protection from side impact collisions located outside the driver."

Defendant by its motion to dismiss has admitted these facts. *U. S.* v. *Shubert,* 1955, 348 U. S. 222, 75 Supp. Ct. 277, 99 L. Ed. 279; *Mandeville Island Farms* v. *American Crystal Sugar Co.,* 1948, 334 U. S. 219, 68 Supp. Ct. 996, 92 L. Ed. 1328.

A jury question on these issues is therefore presented. NOEL, *Manufacturer's Negligence of Design on Directions for Use of a Product,* 71 Yale L. J. 816, 838; 2 HARPER & JAMES, Section 28.5.

4. The Court fails to apply appicable Indiana law on breach of implied warranty and strict liability in tort as set forth in *Restatement of the Law of Torts, Second,* Section 402A.

The Court cites us to no Indiana decision and the writer has been unable to find any such holding that would deny liability to this plaintiff under either of the theories.

The decision of the Court below is contrary to a decision rendered by Judge Hastings in *Dagley* v. *Armstrong Tire and Rubber Co., et al.,* CCA 7th, 1965, 344 F. 2d 245, and is at odds with the decision of Judge Eschbach in *Greeno* v. *Clark Equipment Co.,* DC Ind., 1965, 237 F. Supp. 427.

The above decisions were arrived at in the absence of any decision in Indiana interpreting the *Restatement of the Law of Torts, Second,* Section 420A, but after looking at all available data both Courts adopted the rule which it believed the Indiana Supreme Court would follow. In the instant case no effort was made to decide what position Indiana would follow nor was any reason given for creating a division within the Circuit as to strict tort liability.

WADE, *Strict Tort Liability of Manufacturers,* 19 Southw. L. J. 5, 11, summarizes the jurisdictions that have adopted strict tort liability and as of 1964 indicates there are 29 states in which it is recognized, 12 states in which it is not and 9 states remained uncommitted. He states at page 12:

> "It has been only a half-dozen years since the first decision was rendered applying strict liability to articles other than food products. Already there are holdings or other indications in about half of the states that strict liability will extend beyond food products. A movement this rapid is almost completely unprecedented and is indicative of a strong trend amounting to a groundswell. When this development is combined with the authority of the Restatement and of the numerous writers in the field, the future of the law becomes quite clear."

See also: KATZ, *The Liability in Tort or Warranty of Automobile Manufacturers for the Inherently Dangerous Design of Passenger Automobiles,* 37 Chi. B. Rec. 363.

5. The Court erroneously interpreted and applied Rule 8 F.R.C.P. by refusing to accept as true all facts well pleaded and the legitimate inferences to be derived therefrom because plaintiff failed to allege certain facts in detail as required by the outdated and archaic methods of pleading.

Defendant filed no motion to make such facts part of plaintiff's complaint and some of the omitted facts are completely outside of the issues and theories of plaintiff's complaint.

Plaintiff's claims are based upon defendant's removal from the design of its 1961 Chevrolet automobile of frame rails located outside the automobile's occupants thereby creating a body construction not only of insufficient strength to withstand impact but the absence of frame rails thereby increasing the amount and depth of penetration of the impacting automobile. The absence of frame rails permitted a violation of the passenger compartment. The removal of the frame rails thus removes from the impacted automobile a substance to deflect and minimize the impacting forces and the collapsing left side of his automobile. Safety was not built into the structural integrity of this car—the safety device was in fact removed under the design. With decedent's automobile incapable of providing its occupants with minimal protection in the foreseeable event, *i. e.*, a side impact collision, decedent was killed by the so-called "second accident" which involved his body.

It is thus completely outside the issues of this case, the theories of plaintiff's claims and wholly irrelevant for the Court to hold that the plaintiff does not contend (failure to allege) that the frame could have avoided the collision, or to assert (failure to allege) that the frame caused the automobile to be driven into the path of the striking car or out of its path. Suit here is for defendant's liability arising out of the "second accident" and not the first.

Plaintiff's allegations that the absence of frame rails and the use of the X-frame permitted the collapse of the side of the automobile into plaintiff causing his death. There is no allegation that the striking car's force would have killed decedent and the inference most favorable to plaintiff is that it would not have.

Defendant filed no motion to required plaintiff to allege that the decedent would not have been killed in the same collision. I can assure this Court that plaintiff is sincere in the prosecution of these claims. We would be in bad faith with the Courts if we did not contend and have evidence that the conduct of the defendant brought about the death of decedent. The proof upon this would of course have to be presented at a jury trial under the applicable rules of evidence and causation.

By reverting to the standards of common law pleading, no longer required under the Federal Rules, and in rendering a decision against plaintiff because it failed to plead certain facts in detail will set the F.R.C.P. back fifty years and would nullify the holding of this Court in *Conley* v. *Gibson, supra.*

LEGISLATION.

The law of products liability in Indiana as in this Country in general developed without legislation. *MacPherson* v. *Buick Motors Co.*, 1916, 217 N. Y. 382, 111 N. E. 1050, has been adopted in every state except Mississippi. 78 HARV. L. REV. 1952 (1965).

The suggestion that action first be taken by legislation seems to completely ignore the history of the common law and how it has grown. In 1938, Lester W. Feezer in an article entitled MANUFACTURER'S LIABILITY FOR INJURIES CAUSED BY HIS PRODUCTS: *Defective* Automobiles, 37 Mich. L. Rev. 18, commented upon this very argument.

> "This attitude upon the part of courts is evaive of the judicial responsibility which the common law implicity imposes upon the judge to make the law serve the ends and needs of justice in a changing world. It has been the boast of the common law that it possesses the flexibility to accomplish this end. It is impossible to imagine legislation which will anticipate the innumerable variety of situations which might arise. Thus, adequate provision for handling such cases would be attained only after considerable experiment by the legislature in passing statutes and by the Courts in interpreting them. Legislation of this sort would doubtless be opposed by powerful lobbies of manufacturers able to enlist the further support of publishers who would have an interest based on the expectation of advertising. Local dealers, as a part of the manufacturers' distributing system, would be susceptible to the influence of these man-

ufacturers in securing their influence in turn with their local legislators. Then, too, it is not beyond imagination that counsel for manufacturers might devise contract agreements which would defeat the purpose of such statutes. Only the courts, on the job all the time and alert to effectuate social justice, can stop the gaps."

The goal of safe cars or the unreasonableness of the design of the instant automobile cannot be left solely to legislative action. The Courts have a responsibility to protect consumers under existing laws and to interpret existing Indiana law.

CONCLUSION.

For the reasons above stated, this Court should grant Certiorari in this important product liability litigation.

Respectfully submitted,

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Evansville, Indiana,
Attorney for Petitioner.

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APPENDIX A.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1965—APRIL SESSION, 1966

No. 15278

BARBARA F. EVANS, Personal Representative of the Estate of Roy Evans, Deceased,
Plaintiff-Appellant,
v.
GENERAL MOTORS CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.

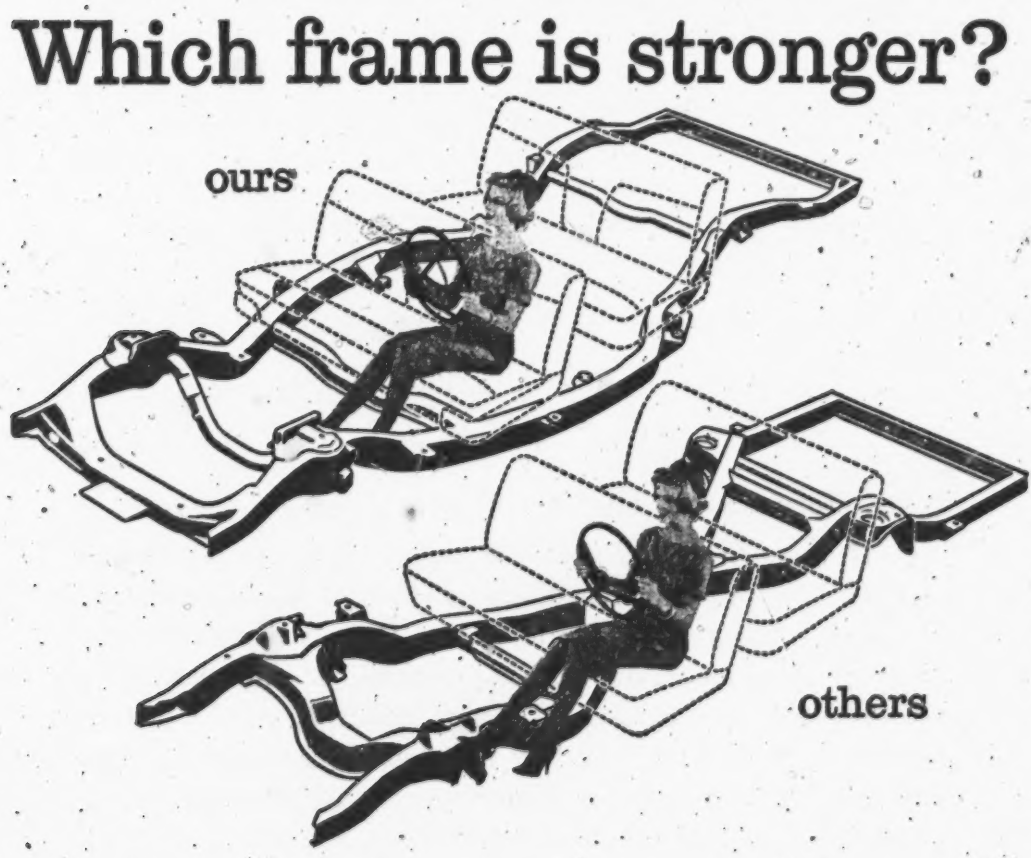
APRIL 15, 1966

Before KNOCH, CASTLE and KILEY, *Circuit Judges.*

KNOCH, *Circuit Judge.* Plaintiff, Barbara F. Evans, personal representative of the Estate of Roy Evans, deceased, brought this action in the United States District Court to recover damages on behalf of the decedent's widow and four dependent minor children, on the ground that his death was caused by the allegedly negligent design of the 1961 Chevrolet station wagon manufactured by the defendant, General Motors Corporation. Plaintiff's amended

complaint in three counts charges negligence, breach of implied warranty, and strict tort liability.

The amended complaint asserts that while decedent was driving across an intersection in the aforementioned station wagon, it was struck from the left side by another automobile, and that the left side of the station wagon collapsed in upon the decedent, inflicting fatal injuries because the station wagon was designed with an "X" frame which did not have side frame rails to protect a driver involved in side impact collisons. Plaintiff's amended complaint incorporated a reprint of a publication in which a rival manufacturer advertises the alleged superiority of its perimeter frame over the "X" frame used by other automobile makers.



After pretrial conferences, oral argument, and submission of briefs, the District Court dismissed the amended complaint on the ground that each count failed to state a claim against the defendant upon which relief could be granted. This appeal followed.

Plaintiff's theory is that the collision which occurred was a foreseeable emergency and that by omitting side frame rails, defendant created an unreasonable risk of harm to occupants of the automobile it manufactured.

Plaintiff asserts that defendant was negligent in designing and in failing to test the design of the automobile; that defendant breached implied warranties that the automobile was of merchantable quality and reasonably fit for use as an automobile; that defendant placed in the stream of commerce an automobile in a dangerous and defective condition in that it was equipped with an "X" frame lacking side frame protection, thus proximately causing the fatal injuries to the decedent when the automobile was involved in a broadside collision, for which the defendant is strictly liable to plaintiff.

The major question before us is the nature of the duty which an automobile manufacturer owes to users of its product. This presents an issue of law for the Court. *Union Traction Co.* v. *Berry*, 1919, 188 Ind. 514, 520-1, 121 N. E. 655, 657; *Kahn* v. *Chrysler Corporation*, D.C., S.D., Tex. 1963, 221 F. Supp. 677, 678.

The defendant concedes that it had a duty to design its automobile to be reasonably fit for the purpose for which it was made, without hiding defects which would make it dangerous to persons so using it.

Plaintiff does not assert that defendant's design could have functioned to avoid the collision. Plaintiff contends that in a trial plaintiff would prove, by expert opinion and subsequently adopted improvements in design by defendant and others, that the solid steel side rails of a perimeter

frame provide added protection against impacts on the body sides. Plaintiff argues that the defendant's "X" frame permitted the side of the automobile to collapse againt the decedent when his station wagon was struck broadside by another vehicle. Plaintiff does not assert that the "X" frame caused the decedent's automobile to be driven into the path of the striking car or prevented it from being driven out of that path. Nor does plaintiff contend that the decedent could not have been killed or injured in this same collision had the 1961 Chevrolet station wagon been designed with a perimeter frame.

A manufacturer is not under a duty to make his automobile accident-proof or fool-proof; nor must he render the vehicle "more" safe where the danger to be avoided is obvious to all. *Campo* v. *Scofield,* 1950, 301 N. Y. 468, 95 N. E. 2d 802, 804. Perhaps it would be desirable to require manufacturers to construct automobiles in which it would be safe to collide, but that would be a legislative function, not an aspect of judicial interpretation of existing law. *Campo* v. *Scofeld, supra,* 805.

Plaintiff's reliance on *Elliott* v. *General Motors Corp.,* 7 Cir., 1961, 296 F. 2d 125, and *MacPherson* v. *Buick Motor Co.,* 1916, 217 N. Y. 382, 111 N. E. 1050, is misplaced. *Elliott* concerned a sharp edged splash shield, hidden from view, but placed where a mechanic would have to put his hands to repair the automobile. While repairing the automobile, Loraine Elliott extended his hand and arm through the splash shield opening, which was designed to allow a mechanic to gain entrance to the engine and oil pan from beneath the automobile. The dangerously sharp and defective edge severed nerves, tendons, muscles, and arteries, permanently disabling his arm and hand. *Mac Pherson* involved a defective automobile wheel which had been made by another and sold to the manufacturer who failed to inspect it. While the plaintiff in *MacPherson* was riding in the automobile, it collapsed because of the defective wheel.

The other cases on which plaintiff relies are also distinguishable on their facts. We note a few examples. In *J. J. Case Co.* v. *Sandefur, Indiana,* 1964, 197 N. E. 2d 519, it was necessary for the plaintiff to step on the cover of an auger in a farm combine to clear the hopper. It collapsed under him because of hidden defects; there was no supporting brace or safety clip, and the lumber and screws used were of insufficient strength. In *McCloud* v. *Leavitt Corp.,* D.C., E.D., Illinois, 1948, 79 F. Supp. 286, a spectator was injured when the defective grandstand in which he was watching a game collapsed under him. In *Carpini* v. *Pittsburgh & Weirton Bus Co.,* 3 Cir., 1954, 216 F. 2d 404, a petcock used to drain the air chamber of the brake system of a bus was located too close to the ground. It broke off on debris in the street. The brakes failed. The driver lost control of the bus. In *Ford Motor Co.* v. *Zahn,* 8 Cir., 1959, 265 F. 2d 729, the ashtray on the dashboard had a defectively jagged edge which inflicted injurise on a passenger when the automobile brakes were suddenly applied. In *Goullon* v. *Ford Motor Co.,* 6 Cir., 1930, 44 F. 2d 310, the rim of the steering wheel on a tractor broke in the driver's hand.

The products involved in all these cases were unfit for their intended use and in precisely that respect were the cause of accidental injuries.

The intended purpose of an automobile does not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions may occur. As defendant argues, the defendant also knows that its automobiles may be driven into bodies of water, but it is not suggested that defendant has a duty to equip them with pontoons.

We cannot agree with the plaintiff that the defendant had a duty to equip all its automobiles with side rail

perimeter frames, or that such a duty can be inferred from the mere fact that some of the defendant's, or some of its competitors', automobiles are now made with side rails, or from the opinions of certain experts that perimeter frames are "safer" in a collision. Defendant had a duty to test its frame only to ensure that it was reasonably fit for its intended purpose.

Unlike the defendants in *Bird* v. *Ford Motor Co.*, D.C., W.D., N.Y., 1936, 15 F. Supp. 590; *Baxter* v. *Ford Motor Co.*, Wash., 1932, 12 P. 2d 409; *Bahlman* v. *Hudson Motor Car Co.*, 1939, 290 Mich. 683, 288 N. W. 309, cited by the plaintiff, General Motors Corporation did not warrant its product to be free of the condition which actually caused the accident. In *Bird* and *Baxter*, the windshields which shattered and cut the plaintiffs in those cases, were expressly represented to be "shatter proof." In *Bahlman*, the two-piece roof welded with a jagged seam that injured the plaintiff, was expressly represented to be a "seamless steel roof."

It is not alleged that General Motors expressly warranted its automobile to have side rails or to be capable of protecting a driver in broadside collisions; nor can such warranty be implied from the allegations in plaintiff's amended complaint. . . .

Our study of all other points and authorities advanced in favor of plaintiff's position discloses nothing that alters our conclusion that the judgment of the District Court must be affirmed.

AFFIRMED.

No. 15278

KILEY, *Circuit Judge*, dissenting.

I respectfully dissent.

The opinion of the court decides that General Motors' duty was, as it concedes, to design its automobile to be

reasonably fit for the purpose for which it is made, and free from hidden defects; that notwithstanding General Motors' foreseeability of possible broadside collisions, the "intended purpose" of the automobile does not include its participation in such collisions; that imposition of any requirements that automobiles be made "more" safe for collisions is a legislative function; and that the district court properly dismissed the complaint for failure to state a claim upon which relief could be granted.

The question before us is whether, assuming the truth of the well-pleaded allegations in the amended complaint, "it appears beyond all doubt" that the plaintiff can prove no set of facts which would entitle her to relief. *Conley* v. *Gibson,* 355 U. S. 41, 45-46 (1957). The amended complaint was in three counts, charging; negligence in design and testing of the 1961 Chevrolet; breach of the implied warranties of merchantability and fitness for the purpose of its manufacture, and strict liability of the manufatcurer for a defective and dangerous automobile.

This is a diversity case; consequently Indiana law controls. No Indiana case has precisely decided the issue before us. But a United States District Court in *Greeno* v. *Clark Equipment Co.,* 237 F. Supp. 427 (N.D. Ind. 1965), and this court in *Dagley* v. *Armstrong Rubber Co.,* 344 F. 2d 245 (7th Cir. 1965), as "Indiana courts" in diversity cases, participated in developing Indiana law in breach of warranty and products liability cases to meet changing conditions. In *Greeno* the court drew upon "available data" and cases from other jurisdictions for the statement of the rule eliminating the requirement of privity in product liability cases. In *Dagley,* 344 F. 2d at 253, an action for breach of implied warranty, this court observed that the "historical concept of warranty," which required privity of contract, was "outdated in view of the changing policies

involved . . . and . . . that the interests of society are best served by eliminating the requirement. . . ." This court took this step as a sequel to its prior decision in *Elliott* v. *General Motors Corporation,* 296 F. 2d 125 (1961), *cert. denied,* 369 U. S. 860 (1962), eliminating the essential of privity in Indiana negligence actions, and that of *J. I. Case Co.* v. *Sandefur, Inc.,* 197 N. E. 2d 519 (1964), in which the Indiana Supreme Court did likewise.

The court in *Greeno* aptly stated, "The direction of the law is clear." 237 F. Supp. at 432. The direction, in my opinion, leads to greater responsibility of manufacturers in designing, testing and manufacturing products, with a purpose of giving reasonable protection against harm to purchasers in the use of the products for their intended purposes. My view is that the Indiana courts would have the same opinion today on the same issue as that before us.

It is a matter of common knowledge that state and federal authorities, non-governmental agencies, and legal and medical groups, as well as automotive producers, are currently engaged in research, discussion and hearings inspired by the appalling annual predictable rate of deaths, now more than 45,000 per year,[1] and reported injuries in the hundreds of thousands, from accidents in automobile traffic. It is in the context of traffic realities that the issue before us, it seems to me, must be decided.

The opinion of the court does not state affirmatively what General Motors' duty is. It rejects plaintiff's theory that General Motors, foreseeing the possibility of broadside collisions, had the duty to include side rails in design of the Chevrolet frame, so as to provide reasonable protec-

---

[1]A special report of The Defense Research Institute, Inc., entitled "The Injury Industry and the Law Explosion," p. 1 (Oct., 1965), reported "some 2.8 million traffic injuries and some 48,000 accidental deaths each year." See also Katz, *Negligence in Design,* 1965 Ins. L.J. 5, 11 (Jan., 1965); Time Essay, "Why Cars Must—and Can—Be Made Safer," *Time,* Apr. 1, 1966, p. 26.

tion against death or injury from broadside collisions; and it inferentially accepts General Motors' theory that its duty was to design its automobile to be reasonably fit for the purpose for which it was made, without hidden defects rendering it dangerous to persons using it for its proper purpose, and that that purpose, as a matter of law, cannot contemplate that automobile's participation in a collision.

In my view, General Motors' duty was to use such care in designing its automobiles that reasonable protection is given purchasers against death and injury from accidents which are expected and foreseeable yet unavoidable by the purchaser despite careful use. See RESTATEMENT (SECOND), TORTS §. 395, especially comments *j* and *k* to this section, and § 398 (1965).

It follows that if plaintiff is able to prove that General Motors violated that duty in failing to include side frame rails in its design, and also proves the other elements entitling her to relief under any of the three counts, she would be entitled to recover unless General Motors can establish a defense to her claims. In any event, it is, in my view, error—once General Motors' duty is recognized—to dismiss this complaint for failure to state a claim upon which relief can be granted. The trier of fact in each case, where prima facie showing is made, must decide whether the design protection is reasonable, depending on the character of the car involved and other relevant considerations.[2]

---

[2]The New York Times, March 8, 1966, p. 36M, concluded its editorial "Safety Gets Into Gear," commenting on the recent Senate hearings on automotive safety, with this paragraph:

> The central issue is the "crashworthiness" of an automobile. Since there are bound to be accidents, no one expects a crashproof car. But cars can be designed to minimize the effects on the passenger once the collision has occurred. It is old fashioned to think that such a car would have to look or drive like a Sherman tank. Safety and style need not be enemies.

The court's opinion notes that in the cases cited by plaintiff the actionable defect itself caused the injury. However, in *Carpini* v. *Pittsburgh and Weirton Bus Co.*, 216 F. 2d 404 (3rd Cir. 1954), an extraneous object cooperated with the faulty design of the petcock to cause the harm, and General Motors, a defendant there, did not dispute its duty of care to the user. And in *Ford Motor Co.* v. *Zahn*, 265 F. 2d 729 (8th Cir., 1959), the Eighth Circuit Court of Appeals rejected Ford's contention that it was not bound to foresee that another car would "suddenly dart" out of a side road in front of the Ford causing application of the brakes, which then propelled the plaintiff-passenger onto a defective ashtray, injuring his eye. Ford there conceded there was a duty of reasonable care in design and manufacture of its product.[3]

---

[3]General Motors has argued here that it owed no duty to plaintiff to utilize, in its design of the automobile, a frame which plaintiff alleges would have provided more protection to the driver than the X-frame which General Motors used, even though it is alleged that this manufacturer knew or should have known this fact. The evident basis fo rthis is that the automobile is intended for travel, not colliding with other vehicles or things. Although no collision was involved in *Ford Motor Co.* v. *Zahn*, the action of the driver in applying the brakes to avoid another car caused plaintiff to be injured by the defectively designed and manufactured ashtray. This prompted Ford to argue that "a reasonably prudent person was not required to anticipate or foresee the usual occurrence and resulting injury to plaintiff," to which the Eighth Circuit responded, in part, 265 F. 2d at 732:

> While the risk of danger was perhaps not as great as that which might inhere in a defective wheel or a defective steering mechanism, nevertheless, the fact remains that plaintiff *did* suffer a serious injury, and the jury could properly consider as a circumstance that in this era of fast moving automobiles, emergencies arise frequently which require the sudden application of brakes which in turn throw the occupants of the automobile forward and against the dashboard. The records reveals that defendant was fully conscious of the necessity of guarding against injuries resulting from such occurrences.

While the possible negligence of the plaintiff's decedent, or the driver of the other car, may present an issue of causation, this

(Footnote continued on following page.)

I recognize that safety standards for automobiles would normally be a legislative matter. The United States Senate is now considering the question of federal standards. The General Services Administration has itself set up standards for automobiles it will purchase. There is currently an abundance of books and magazine and newspaper articles, condemning, as well as defending, the record of manufacturers of automobiles in safety design and production. The particular issue before us is merely a reflection of the broad national issue being debated at this time. But the possibility of future adequate legislative standards does not remove the necessity of presently deciding whether plaintiff should or should not have an opportunity to prove the allegations made in the complaint.

I would reverse the judgment in favor of General Motors on its affirmative defenses to Counts I and II, and on its motion to dismiss Count III; and would remand for further proceedings.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

(Footnote continued from page 44.)

should not eliminate from the case the duty of the automotive manufacturer.

It is also of interest to note that not only did a rival manufacturer of General Motors assert, in words and in the reprint produced in the majority opinion, the alleged superiority of a perimeter-type frame over the "weak in the middle" X-frame, but an advertisement for the 1959 Oldsmobile reproduced in plaintiff's brief features the "all-new Guard-Beam Frame" in these words: "It combines heavy U-channel and box-member side rails with a huge center X-member. . . . Solid steel side rails provide added protection against impacts on the body sides."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 344

BARBARA F. EVANS,
PERSONAL REPRESENTATIVE OF THE ESTATE OF ROY EVANS,
Petitioner,

vs.

GENERAL MOTORS CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

QUESTION PRESENTED.

The sole question presented by this diversity action is whether the court below correctly held under Indiana law that an automobile manufacturer may not be held responsible for injuries and deaths to users in collisions which its automobiles in no way *cause,* but merely *fail to prevent.*

STATEMENT.

Plaintiff's husband was killed in a typical intersection automobile collision when his 1961 Chevrolet Stationwagon was struck in the left side by another automobile.[1]

This diversity action against the manufacturer of decedent's stationwagon does not concern the admitted, well accepted principle that an automobile manufacturer owes a duty to users of its products to design and manufacture its products reasonably fit for their intended use free from latent defects. Respondent admits it has such a duty. Rather, petitioner has urged that the defendant as such manufacturer has an additional duty under Indiana law to protect users of its products from injury or death when struck by other automobiles, trains, tornadoes or any type of other forces or objects. The District Court and the Court of Appeals below held that no such duty exists under Indiana law.

The amended complaint in three counts charges defendant manufacturer with negligence in design and in failing to test design, with breach of implied warranty of fitness, and with strict liability in tort for placing in the stream of commerce an automobile in a dangerous and defective condition.

Each paragraph of complaint is based upon the same alleged defect in the stationwagon—its frame. It is alleged that General Motors knew that its automobiles are sometimes struck in the side by other vehicles; that the 1961 Model Chevrolet was dangerously defective to drivers when struck in the side because it had been designed with

1. The speed of the striking vehicle is not alleged in the complaint. However in plaintiff's complaint in state court against the driver of that vehicle she alleged that "he was then and there driving at a high and dangerous rate of speed of seventy (70) to seventy-five (75) miles per hour." (Appendix to Def. Br. below, p. 18.)

an "X" type frame without frame side rails instead of with a perimeter frame such as used by defendant in Oldsmobiles and by Ford in Fords and Mercuries; that when the stationwagon driven by plaintiff's husband was so struck, its "X" frame *permitted* its body to collapse against decedent's body, thereby *proximately causing* his death; that if the 1961 Model Chevrolet had been designed with a perimeter frame, plaintiff's husband would have had *added* (not necessarily *adequate*) protection in the side impact collision in which he was involved; and that General Motors knew of the alleged defect in the 1961 Model Chevrolet or at least could have discovered it by testing the "X" frame of such automobile from the standpoint of side impact collisions. (Appendix to Pl. Brief below, pp. 3-12.)

After pretrial conferences, oral argument, and submission of briefs, the District Court dismissed the amended complaint on the ground that each count failed to state a claim against defendant upon which relief could be granted. (Appendix to Pl. Br. below, pp. 1-3.) The majority of the court below affirmed, with Judge Kiley dissenting. (Petition, Appendix A, pp. 35-45.)

SUMMARY OF ARGUMENT.

Plaintiff's amended complaint against the manufacturer of an automobile which her husband was driving when he was killed in an intersection collision presents a claim which is not recognized under the products liability common law of Indiana, or for that matter, under the law of any other state.

The claim is *not* that defendant set in motion any force which *itself injured or killed* plaintiff's husband, or which *caused* or *contributed in any way* to the collision which killed him.

The only claim asserted is that the design of the frame

of such automobile was such that it failed to provide protection to plaintiff's husband in such collision—that it *permitted* the body of his automobile to collapse against him, when it was struck in the side by another automobile.

Plaintiff's amended complaint was dismissed by the district court for failure to state a claim upon which relief could be granted and such dismissal was affirmed by the court below.

The decision below is clearly correct and there is no reason for this Court to review it. Under Indiana law, as well as the law generally, an automobile manufacturer must make his product reasonably fit for the *purpose* for which it is made and used, and he is responsible for harm *caused* by his failure to do so. But an automobile is neither made nor used for the purpose of having it struck by other automobiles, and the manufacturer is under no duty to design it so that it can be used with reasonable safety for such purpose, even though he knows that such accidents sometimes happen. Thus, as a matter of law, an automobile manufacturer cannot be held liable for injuries or deaths in collisions which the design of his automobile does not *cause*, but merely *permits*, and plaintiff's amended complaint was properly dismissed.

ARGUMENT.

I. PLAINTIFF'S CLAIM IS ANOMALOUS.

The majority opinion below took particular note of the unusual nature of plaintiff's claim:

> "Plaintiff does not assert that defendant's design could have functioned to avoid the collision. Plaintiff contends that in a trial plaintiff would prove, by expert opinion and subsequently adopted improvements in design by defendant and others, that the solid steel side rails of a perimeter frame provide added protection against impacts on the body sides. Plaintiff argues that the defendant's 'X' frame permitted the side of the automobile to collapse against the decedent when his station wagon was struck broadside by another vehicle. Plaintiff does not assert that the 'X' frame caused the decedent's automobile to be driven into the path of the striking vehicle or prevented it from being driven out of that path. Nor does plaintiff contend that the decedent could not have been killed or injured in this same collision had the 1961 Chevrolet station wagon been designed with a perimeter frame." (Petition, Appendix A, pp. 37-38.)

Plaintiff's claim, therefore, clearly is not a "garden variety" products liability claim. Defendant is not charged with having set in motion any force which itself injured or killed plaintiff's husband, or which caused or contributed to the collision in which he was killed. Defendant's only alleged *fault* was in designing an automobile frame which, for all that is alleged in the complaint, functioned perfectly as an automobile frame, at the time of the accident, but which *permitted* plaintiff's husband to be killed in such accident.

Plaintiff does not bother to explain how something which

merely "permits" injury becomes *in law* the proximate cause of such injury, and why, if the "X" frame of this automobile was the proximate cause of the death of her husband, the exact same thing could not be said about every other part of the automobile, since they, likewise, did not prevent his death.

Thus, plaintiff would abolish, with one fell swoop, the fundamental tort principle that permitting something to is not causing it to happen, except in those instances where, by statute or by a voluntary undertaking, a *duty* is imposed upon the permitting party to exercise due care to prevent the happening. There are no facts alleged in plaintiff's complaint from which it could be inferred that defendant *undertook* to protect drivers of the 1961 Model Chevrolet from injury in side impact collisions. (See Petition, Appendix A, p. 40.)

If plaintiff's claim has merit, then automobile manufacturers may be held responsible for all injuries and deaths occurring to persons riding in or driving automobiles manufactured by them, regardless of the circumstances, since it is always true, when such injuries and deaths occur, a jury may find that the design of the automobile "permitted" such injuries to occur.

There is no doubt but that this is *precisely* plaintiff's position. At page 14 of her petition, she states:

> "The cause of all injuries and deaths was for years assumed to be the result of the negligent operation of the vehicle on the highway. Research has revealed that it is not the impact between the two vehicles and/or object that causes the injury and/or death, but it is the impact between the vehicle occupant and the vehicle interior or some other object which causes the damage. This is the so-called 'second accident'."[2]

2. Such "research" did not reveal this to be a *legal* theory of causation. It is nothing more than a suggestion of a member of the Illinois bar, Harold A. Katz, made in a comment published

And at page 31 of her petition plaintiff states without qualification that: "Suit here is for defendant's liability arising out of the 'second accident' and not the first."

So, although the claim here involves a side impact collision with another automobile and a complaint against only the design of the frame of defendant's automobile, if defendant can be held liable for the death of plaintiff's husband in this so-called "second accident", it can be held liable for failing to prevent all injuries in "second accidents", regardless of the nature of or responsibility for the first accident.

This is not, therefore, a claim for negligence, or for breach of implied warranty of fitness, or for strict liability in tort. It is a claim to establish legal liability without legal fault.

Plaintiff denies this. She says that "The restraining factor in this litigation may be found in plaintiff's theory of liability which seeks recovery because of the unreasonable risk created by defendant." (Petition, p. 15.) By this, plaintiff means that the manufacturer is only required to protect against a "*foreseeable* emergency." (See Petition, p. 4.) This is no restraining factor at all. It erroneously equates duty to what is foreseeable. By now, every automobile manufacturer knows that its automobiles can strike objects and be struck by objects of every conceivable kind at every square inch of the automobile—from top to bottom, front to back and side to side, from every conceivable angle and with every conceivable force. Such knowledge, according to plaintiff, creates liability when an automobile

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in the Harvard Law Review. See *Katz, Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars*, 69 Harv. L. Rev. 863. Mr. Katz did not purport to find any legal precedent for his suggestion and admitted that its adoption would pose problems, but he nevertheless felt that it would furnish a "great incentive for improved design" of automobiles. *Id.* at 872-3.

occupant is "permitted" to be injured in any such collision.

II. THE DECISION BELOW.

In affirming the dismissal of plaintiff's complaint for failure to state a claim, the majority of the court below held, as a matter of law, that the duty which defendant owed to users of its automobiles did not require it to design an accident-proof or fool-proof automobile; that its duty was to design an automobile to be reasonably fit for the purpose for which it was made, without hidden defects which would make it dangerous to persons so using it; that the intended purpose of an automobile does not include its participation in collisions, despite the manufacturer's ability to foresee the possibility that such collisions may occur; and thus, that defendant's design duty did not require it to design an automobile which would be "more" safe in collisions, or to test its design from that standpoint, since the danger from a collision is obvious to all. Accordingly, the court held that defendant's duty did not require it to equip all its automobiles with side rail perimeter frames, even though defendant and other manufacturers may have used such frame in other automobiles and even though such frames, in the opinion of certain experts, were "safer" in a side impact collision. (Petition, Appendix A, 37-40.)

In a dissenting opinion, Judge Kiley agreed with the plaintiff. (Petition, Appendix A, pp. 40-45.)

III. PLAINTIFF'S "REASONS FOR GRANTING WRIT" ARE NON-EXISTENT.

Plaintiff's counsel is obviously well aware that this Court seldom concerns itself with diversity actions such as this involving nothing more than the application of state law by a tribunal deemed to be an expert in the matter. See

Steele v. *General Mills* (1947), 329 U. S. 433, 438-9. In a desperate effort to entice this Court into reviewing such a decision, he has proceeded to conjure up a so-called "question of great national significance," a so-called constitutional issue, a large number of so-called decisional conflicts, and a so-called abortion of the Federal Rules of Civil Procedure. None of these exist.

The so-called question of great national significance is nothing more than the insinuation that the nation's highway death toll will be greatly intensified if the decision below is left to stand. This insinuation is made by a vague reference to the number of people killed and injured each year in traffic accidents, and by a completely false statement that the court below decided "that an automobile manufacturer does not have to exercise ordinary care in the design and manufacture of an automobile." (Petition, pp. 13, 25.)

The court below, of course, decided no such thing. As already noted, that court recognized that an automobile manufacturer does have a duty to make its automobiles reasonably fit for their intended use, but held this duty did not include a duty to make an automobile reasonably safe to be struck by other automobiles in collisions. Thus, contrary to petitioner's assertion, the duty imposed upon manufacturers of automobiles has not been diminished in any way, and the highways are not about to be flooded with carelessly built automobiles. Such manufacturers, after the decision below, have precisely the same duty as they had before the decision was rendered.

The nation's highway toll is of course a matter of great national concern. The Congress is presently grappling with the problem. But the number of deaths involved in the use of automobiles canont create a duty under the common law for automobile manufacturers, where no duty exists,

any more than the number of deaths involved in use of guns can create a duty under the common law for gun manufacturers, where no duty exists. The Congress is also presently grappling with the gun problem. The solution to these problems is not to be found in this Court or in any other court.

The so-called constitutional issue raised by plaintiff is nothing more than an evasive argument. She asserts that she was deprived of her right to a jury trial. (Petition, pp. 16-18; 25.) Obviously she was not if her complaint was properly dismissed for failure to state a claim upon which relief could be granted.

The so-called decisional conflicts involve an astounding bit of legal reasoning. Taking a cue from this Court's statement in *Conley* v. *Gibson* (1957), 355 U. S. 41, 45-46 that:

> ". . . a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

plaintiff argues:

1. that under Indiana law the nature and extent of a defendant's duty presents a *fact* question for the jury, once it has been alleged that there was *some* relationship between the parties showing that defendant owed plaintiff *some* duty; and
2. that plaintiff would have offered evidence below from which a jury could have found that defendant had a duty to equip the 1961 Model Chevrolet with a perimeter frame.

Plaintiff then proceeds to present to this Court her so-called evidence of duty, consisting of magazine articles, Oldsmobile advertising materials, and excerpts from testi-

mony of defendant's representatives before legislative committees, all of which, according to plaintiff, establish that defendant has "admitted" that it had such duty, and that defendant had knowledge of the alleged defects of the "X" frame. (Petition, pp. 5-12; 16-22.)

This argument might have some semblance of validity if whether a duty exist is, as plaintiff claims, a fact question. But it clearly is *not*—not in Indiana or anywhere else. It is a pure law question. As stated by the Indiana Supreme Court in the very decision relied on by plaintiff:

> ". . . The duty to exercise care for the safety of another arises *as a matter of law* out of some relationship existing between the parties, and it is the province of the Court to determine whether *such* a relation is shown as gives rise to such duty. In determining whether the relationship shown gives rise to a duty to use care, the Court decides a pure question of law." *Union Traction Co.* v. *Berry* (1919), 188 Ind. 514, 520-1, 121 N. E. 655, 657. (Emphasis added.)

There is no support anywhere for plaintiff's assertion that the court determines, from the relationship alleged, whether there is "some" duty, and the jury then determines the "nature and extent" of that duty. It is entirely a question of law to be determined by the court from the allegations of the complaint. See *Kahn* v. *Chrysler Corporation* (D. C. S. D. Tex. 1963), 221 F. Supp. 677, 678) cited with approval by plaintiff at page 27 of her petition:

> "However, who is to determine if a duty exists? Is this a matter of law or a disputed question of fact itself. Certainly there is disagreement in the instant case over whether or not the defendant had a duty to so design his vehicle that an accident like that under consideration could not happen. The very essence of plaintiff's complaint is that the defendant owed to the plaintiff a duty to manufacture an automobile with which it was safe to collide. But this is not sufficient

> to constitute a disputed fact issue, for this is a question of law to be determined by the court. *Whether or not a legal duty exists* on a given state of facts so as to give rise to actionable negligence on breach thereof, *as well as the nature and extent of the duty*, if any, is always essentially *a question of law.*" (Emphasis added.)

Clearly, therefore, the ruling below that whether a duty exists presents a question of law for the court is entirely consistent with Indiana law and with this Court's holding in *Conley*. Obviously, if as a matter of law, there is no duty there can not possibly be any fact question for a jury.

It is also claimed that the decision below conflicts with certain Indiana decisions holding that issues of foreseeability, proximate cause, and contributory negligence, present questions of fact for the jury. (Petition, pp. 25-26.) This is merely another way of repeating the erroneous assertion that duty is a fact question. Such issues can not possibly arise until the question of defendant's duty has first been determined as a matter of law, which can only be done by the Court.

And a conflict is claimed between the decision below, in affirming the dismissal of the implied warranty and strict liability counts of plaintiff's complaint, and two other decisions in this Circuit (*Dagley* v. *Armstrong Tire & Rubber Co., et al.* (7 Cir. 1965), 344 F. 2d 245; *Greeno* v. *Clark Equipment Co.* (D. C. N. C. Ind. 1965), 237 F. Supp. 427) which held that actions for breach of implied warranty and for strict liability in tort could be maintained against manufacturers, under Indiana law. *Dagley* and *Greeno* did so hold, but they did *not* hold that all of such actions would present fact questions for the jury. Neither did the court below hold that no such actions could be maintained in Indiana, but only that plaintiff's counts failed to state a claim under such theories.

Finally, it is claimed that the decision below will set the Federal Rules of Civil Procedure back fifty years. By this plaintiff has reference to the statements in the lower court's opinion, already noted, that plaintiff's complaint does not allege that the frame of her husband's automobile caused or contributed in any way to the collision in which he was killed or that he would not have been killed anyway even had his automobile been equipped with a perimeter frame. She says that these things are either irrelevant or else the court below should have assumed such facts since the defendant filed no motion to require plaintiff to supply omitted facts. (Petition, pp. 30-31.) This silly argument answers itself.

The only other reason advanced by plaintiff for this Court to review the decision below is that it was incorrect on the merits. That reason too is non-existent, as shown below.

IV. THE DECISION BELOW IS CLEARLY CORRECT—ALL THREE COUNTS OF COMPLAINT ARE BASED ON A BREACH OF AN ALLEGED DUTY WHICH DEFENDANT, AS A MATTER OF LAW, DID NOT HAVE.

A. The Negligence Count.

The duty of a manufacturer under Indiana law is to make his product reasonably fit for its intended use, without hidden defects which would make it dangerous to persons so using it. *J. I. Case Co.* v. *Sandefur* (Ind. 1964), 197 N. E. 2d 519.

This duty is not unlimited. As noted by the Indiana Supreme Court in *Sandefur*:

> ". . . On the other hand, there must be reasonable freedom for the manufacturer. He is not an insurer against accident, and is not obligated to produce only accident-proof machines. The emphasis is on the duty

to avoid hidden defects or concealed dangers. *Campo* v. *Scofield* (1950), 301 N. Y. 468, 95 N. E. 802."

The citation of the *Campo* case by the Indiana Supreme Court is most significant. That decision holds, in no uncertain terms, that when the source of a danger is *obvious,* the manufacturer is not required to make his product "more" safe:

> "Just as the manufacturer is under no obligation, in order to guard against injury resulting from deterioration, to furnish a machine that will not wear out, so he is under no duty to guard against injury from a patent peril or from a source manifestly dangerous . . . In other words, the manufacturer is under no duty to render a machine or other article 'more' safe—as long as the danger to be avoided is obvious and patent to all." *Campo* v. *Scofield* (N. Y. 1950), 95 N. E. 2d 802, 804.

The Wisconsin Supreme Court, in *Yaun* v. *Allis-Chalmers Mfg. Co.* (Wis. 1948), 34 N. W. 2d 853, 858, made the same observation as to an automobile:

> "The fact that an automobile properly made may cause injury to its occupants if permitted to leave the highway while traveling at a high speed may in a general sense make it a dangerous instrument, *but that is not the kind of danger for which courts have held the manufacturer responsible.*" (Emphasis added.)

See also *Ein* v. *Goodyear Tire and Rubber Co.* (D. C. N. D. Ind. 1959), 173 F. Supp. 497, 498:

> "Generally, the law is that *only* if an automobile construction is defective is it considered inherently dangerous to human safety, thereby rendering a manufacturer liable to an owner or passenger for injuries caused by such defective construction. *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916 F. 696; *Walker* v. *General Motors Corp.*, D. C. La. 1953, 115 F. Supp. 267. *There is no liability on the manufacturer simply because an automobile may be-*

> *come an instrumentality by which an injury is inflicted.* In other words, the manufacturer is not an insurer. It follows naturally that he has no duty to warn that an automobile may become such an instrumentality." (Emphasis added.)

These observations are particularly pertinent here. The danger to plaintiff's husband was not from the frame of his automobile, but from the striking automobile. If anything was obvious to him when he bought this automobile, and each and every time he got in it, it was that people in automobiles get killed when hit broadside by another automobile. During the previous ten years, hardly a day has passed without this being forcefully brought home to everyone via observation, newspapers, radio and television. Even if it is assumed that plaintiff's husband did not inspect this automobile prior to buying it or prior to getting in it on the day he was killed to determine whether or not its frame had side rails, there is no suggestion here that there was anything about the appearance of the automobile —inside or out—that made it look one bit safer in which to be hit broadside than the thousands of other automobiles in which thousands of other people had been killed in side impact collisions.

It is significant that plaintiff's complaint, before finally amended, alleged that defendant

> "* * * negligently failed to warn drivers of 1961 Chevrolet Stationwagon automobiles, including Roy Evans, that said automobile did not have a side guard-rail type frame, perimeter type frame, or any other type of outer frame protection, and was weak in the middle and had no strong side protection to protect drivers when involved in side impact collisions." (Appendix to Def. Br. below, p. 5.)

This claim was dropped in the final version. (Appendix to Pl. Br. below, pp. 3-12,) Presumably, plaintiff recog-

nized the inconsistency of such a claim. If defendant had had the duty which is here sought to be imposed, it could have discharged it by warning plaintiff's husband that the frame of its automobile had no side rails, or that its automobile was not safe to engage in side impact collisions. But while such a warning could conceivably have told plaintiff's husband something about the frame of the automobile which he didn't know, it could not conceivably have told him anything he didn't already know about the danger of being hit broadside by another automobile. Such a warning would have served no purpose. Plaintiff's husband did not, or at least it is not so alleged, buy this automobile for the express purpose of engaging in a side-impact collision. Defendant did not, or at least it is not so alleged, make it or represent it to be fit for that purpose. (See Petition, Appendix A, p. 40.) And though it may *seem* otherwise, certainly the average motorist does not buy an automobile for the purpose of smashing it or having it smashed and no one needs to be warned that it is not a safe thing to do in any automobile, regardless of make, model or frame. *Ein* v. *Goodyear Tire and Rubber Co.* (D. C. N. D. Ind. 1959), 173 F. Supp. 497, 498.

A manufacturer is not required to design his product so that it will be safe to strike someone with, or safe to be in or around when an outside force strikes.

In *Poore* v. *Edgar Bros. Co.* (Calif. 1939), 90 P. 2d 808, it was claimed that the glass installed by defendant in a used automobile sold to plaintiff was not fit for its intended purpose because it broke in a collision, cutting the plaintiff. The trial court dismissed the complaint and the appellate court affirmed, stating:

> "The liability of a manufacturer or vendor under the rules here relied upon is for such negligence, in the construction of an article, as renders the same inherently dangerous if used for the purpose for which

it was intended. *These rules have no application where an article is not inherently dangerous for its intended use, and where it becomes dangerous only when something else intervenes.* While defective wheels or brakes on an automobile make it inherently or imminently dangerous, danger being a probable rather than merely a possible result of its use, the same may not be said of the use of ordinary glass instead of safety glass in its windows. *Automobiles are intended to run upon the highways and to be kept under control, but the glass in their windows is not intended to withstand blows as a part of its ordinary use.* While such windows may be broken, and frequently are, this is due to intervening causes and not to the fact that they are inherently dangerous for the purpose for which they were intended. Cars ran for years with ordinary glass in the windows and the new statutes requiring safety glass were adopted not because other glass was inherently dangerous in the intended use of a car but because of the greater likelihood of intervening causes of danger, due largely to the increased number of cars on the road. *The resulting danger is one arising from outside sources rather than from any inherent danger in the article itself.*'' 90 P. 2d at 809-10. (Emphasis added.)

In *Tamburello* v. *Travelers Indemnity Co.* (D. C. E. D. La. 1962), 206 F. Supp. 920, the infant plaintiff was riding in a baby seat in an automobile driven by its mother. The baby seat became dislodged from the car seat when the mother ran the automobile into a tree. The suit was against the insurer of the manufacturer of the baby seat claiming breach of warranty and negligence for manufacturing and selling a seat which failed to remain fixed to the automobile seat during the collision. The court granted summary judgment for the insurer, stating:

> ''It is not the intention of the court to minimize the seriousness of the child's injuries. . . . But unfortunate though the situation may be, plaintiff's claim against the insurer of the manufacturer of the baby car seat

it not a reasonable one, and must be disposed of by summary judgment.

"... No allegations have been made and no evidence could be offered under the undisputed circumstances here to support plaintiff's theory. There is no controverted question of fact which would preclude a summary judgment in these proceedings. *No cause of action has been established by plaintiff, and no actionable negligence or breach of warranty has been shown against defendant's insured which would allow recovery.* The label attached to the baby seat, 'On the road absolute safety' upon which plaintiff avers he relied in purchasing this item (at a cost of approximately $5.00) was obviously not intended to be a guarantee that the car seat would remain intact under any and all circumstances and particularly in a collision of such force as plaintiff's wife was involved in here. *All that the warranty amounts to is that during the normal operation of an automobile, a child seated in the car seat would remain seated. But this does not mean that plaintiff and his wife, relying on the warranty, can relax the necessary vigilance and caution for the safe operation of their automobile.*" 206 F. Supp. at 922. (Emphasis added.)

In *Hatch* v. *Ford Motor Company* (Calif. 1958), 329 P. 2d 605, a child walked into a pointed hood ornament on an automobile and lost an eye. The trial court sustained a demurrer to the complaint and this was affirmed on appeal, the court stating:

"If we were to hold that there was a duty to render a vehicle safe to collide *rather than simply a duty to so manufacture it as to make it safe for the use for which it is intended, i.e., to move upon the highways or to be safely parked,* that duty would apply not only to ornaments such as that in question here but to functional parts of the vehicle. If, in the present case, the minor plaintiff had stumbled as he approached the vehicle and struck his face against a headlight lens causing it to fracture and lacerate his eye, the question of duty to make the vehicle safe to collide with

would be clearly presented under a claim that if the headlight lens had been made of safety glass the plaintiff would not have lost his eye; or, if the plaintiff had collided with the side of the car and his eye been impaled upon a radio antenna which had been telescoped so that its point protruded but a few inches above the body of the car, again the claim might be made that this created a danger which might have been avoided by enclosing the antenna within the body of the car so as not to protrude therefrom. *In other words, each case in which a person collided with a standing vehicle and received some injury from a part of a vehicle which injury he might not have sustained had the vehicle been constructed in some other manner would raise a question of fact as to whether the manufacturer was liable to that person. In effect the triers of the facts would be the arbiters of the design of automobiles and the standard of design would be determined not when the automobile was manufactured but after the occurrence of an accident.*" 329 P. 2d at 607-8. (Emphasis added.)

These cases conclusively demonstrate that as a matter of law an automobile is not made or used for the purpose of striking or being struck by other vehicles or objects and that the duty of an automobile manufacturer does not include the duty to design an automobile from the standpoint of how it may be misused or bludgeoned by outside forces. Merely because a product can be used dangerously or because a user while using it can be subjected to danger, not from the product but from something else, does not mean that the product is manufactured for such purpose, nor is the manufacturer required to protect the user from such danger.

Unless convertibles are to be outlawed (no protection whatever from "top impacts"), unless the use of glass in automobiles is to be outlawed (no protection from anything except the weather), unless compact models are to be outlawed (necessarily less protective than more expensive

models), it must be the law that a manufacturer of an automobile is free to build an automobile with a frame or without a frame with sides or without sides with a top or without a top, so long as it is reasonably fit for its intended use as a means of transportation. Obviously, it cannot have hidden defects which would make it dangerous when so used. But just as obviously, it does not have to qualify as a safe place to be when a tornado strikes.

The principal authority cited for plaintiff's claim, both by the plaintiff in her petition (pp. 23-24) and by the dissenting judge below (Petition, Appendix A, p. 43), is the Restatement of the Law of Torts, Second, §§ 395 and 398. These sections read as follows:

> "§ 395. A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied."
>
> "§ 398. A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design."

There is absolutely nothing in these sections or in the many comments concerning them which suggests that a manufacturer may be held liable for any so-called second accident between his product and a user when his product was in no way responsible for the first accident. In order to find such liability for this defendant in these sections,

plaintiff and the dissenting judge below must re-write them drastically.

They must say that "caused" does not mean caused in the legal sense but means "permitted to happen."

They must say that the phrase "for a purpose for which the manufacturer should expect it to be used" means that an automobile manufacturer should expect that his automobile will be used *for the purpose of* having it struck by another automobile.

And they must say that the automobile manufacturer under these sections is not only required to protect the user from harm from an outside force but that he is also required to protect the automobile itself from such harm, since Comment (n) to § 395 clearly states that "the rule stated in this Section applies where *the only harm* which result from the manufacturer's failure to exercise reasonable care *is to the manufactured chattel itself.*" (Emphasis added.)

Moreover, since these two sections of the Restatement do not apply to automobile manufacturers *only,* but re-state the common law application to *all* manufacturers of *all* chattels, plaintiff and the dissenting judge below must say that such sections would require the manufacturer of an umbrella, for example, to make it so as to provide reasonable protection to a user and to the umbrella itself from harm from a falling tree. All of the elements of such theory of liability would be present in such an occurrence. The umbrella would have been used in a rain storm. The collision between the tree and the umbrella would have been foreseeable. Harm would have been permitted to happen to the user and to the umbrella. And the manufacturer of the umbrella should have expected that it would be used for the purpose of having it struck by a falling tree.

If the Restatement is to be construed as imposing such

liability upon an automobile manufacturer, but not an umbrella manufacturer, on what basis is the distinction to be made? It is no answer that people can see that an umbrella is no real protection from a falling tree. People can also see that automobiles are no real protection from striking automobiles. The lesson is repeated every day of the year. It is simply ignored.

Neither is it any answer that the umbrella manufacturer cannot be expected to provide such protection in the case of an umbrella, whereas the automobile manufacturer can be expected to provide such protection in the case of an automobile. These are only current opinions shared by some, but not necessarily all people. Who knows what opinions would prevail about what umbrella manufacturers could do after research (of the second accident type) into the tree-umbrella collision under the pressure of 45,000 deaths a year from that type of collision? Plaintiff herself admits in her petition (p. 14) that the notion that automobile manufacturers can do something about the second accident is of recent origin.

The point is, the common law, unlike legislation, does not impose duties on the basis of current opinions about particular manufacturers which may be conflicting and which are subject to momentary change, and the Restatement cannot be so construed.

Neither the plaintiff nor the dissenting judge below has cited a single decision which holds or even suggests that the automobile manufacturer must not only make a product reasonably fit for its intended use, but must also furnish reasonable protection against harm solely caused by outside forces being brought to bear upon the automobile through no fault of the manufacturer.

The dissenting judge, in his opinion, believed that two cases might be placed in this category—*Carpini* v. *Pitts-*

burgh and Weirton Bus Co. (3 Cir. 1954), 216 F. 2d 404, and *Ford Motor Co.* v. *Zahn* (8 Cir. 1959), 265 F. 2d 729—neither of which is relied on or even cited by plaintiff in her petition.

Both of these cases are clearly distinguishable on their facts. In *Carpini,* the claimed defect in the design of the braking system of a bus (a petcock used to drain the air chamber of the system was located too close to the ground and was broken off by debris in the street, resulting in a failure of the brakes) was a *direct cause* of the collision and the injuries suffered by the passengers of the bus. In *Zahn,* an ash tray with a protruding jagged edge, which the manufacturer conceded should have been discovered by its inspectors and remedied, was a *direct cause* of the plaintiff's eye being put out when the brakes of the automobile were suddenly applied and he was thrown against the defective ash tray. Neither of these cases involved a mere failure to furnish protection from injuries inflicted solely by an independent outside force.

Plaintiff, in her petition, cites a host of decisions, without disclosing their facts. None of them involved an outside force.

MacPherson v. *Buick Motor Co.* (N. Y. 1916), 111 N. E. 1050 (Petition, pp. 23, 24, 32), which plaintiff admits states the products liability law of every state except Mississippi (Petition, p. 32), involved a defective automobile wheel which collapsed under the automobile.

Elliott v. *General Motors Corp.* (7 Cir. 1961), 296 F. 2d 125 (Petition, p. 23), involved a sharp edged splash shield, hidden from view, but placed where a mechanic would have to put his hands to repair the automobile.

Coca-Cola Bottling Works of Evansville v. *Williams* (Ind. App. 1941), 37 N. E. 2d 702 (Petition, p. 23), involved

foreign matter (a piece of concrete) in a bottle of Coca-Cola, which plaintiff drank.

Holland Furnace Co. v. *Nauracaj* (Ind. App. 1938), 14 N. E. 2d 339 (Petition, p. 23) involved a furnace installed on a wooden instead of a non-combustible platform which caught fire from the heat of the furnace and burned the house.

Dagley v. *Armstrong Rubber Company* (7 Cir. 1965), 344 F. 2d 245 (Petition, pp. 24, 28), and *Halpern* v. *J. A. D. Construction Co.* (N. Y. Sp. Ct. 1960), 202 N. Y. S. 2d 945 (Petition, p. 27), both involved an automobile tire, claimed to have been defectively designed and to have blown-out causing a collision.

Meyer v. *Greenwood, et al.* (Ind. App. 1955), 124 N. E. 2d 870 (Petition, p. 25), involved pork infested with trichinae with plaintiff bought and ate, becoming ill. An Indiana statute prohibited the sale of adulterated food, the violation of which constituted negligence *per se.*

Robertson Music House v. *Wm. H. Armstrong Co.* (Ind. App. 1929), 163 N. E. 839, and *Hamilton, Executor,* v. *Feary* (Ind. App. 1893), 35 N. E. 48, are cited by plaintiff for the proposition that under Indiana law, even where defendant owes no duty to protect plaintiff, if he nevertheless undertakes to protect the plaintiff, he is liable for damages sustained on account of his failure to exercise reasonable care in the pursuit of such undertaking. This is sound Indiana law, but it has no application here. The complaint does not allege that defendant "undertook to provide additional protection against impact on the body sides" of the 1961 Chevrolet. The theory of plaintiff's complaint is that defendant was negligent in failing to undertake to provide such protection.

Plaintiff also quotes, out of context, from three opinions, again without discussion of any facts. Thus, she quotes

(Petition, p. 26) the following language from the opinion in *Davlin* v. *Henry Ford & Son, Inc.* (6 Cir. 1927), 20 F. 2d 317, 319:

> "Its duty . . . to use reasonable care in employing designs . . . which would fairly meet any emergency of use which could reasonably be anticipated."

But she does not disclose that *Davlin* involved the seat of a tractor which broke causing the user to fall and be run over by the tractor, and that in this case *a directed verdict for defendant manufacturer was affirmed* because plaintiff failed to prove how the tractor was being used at the time of the accident, the court stating:

> ". . . the burden was on the plaintiff to show . . . reasonable use. Before plaintiff was entitled to a submission of the case to the jury, the nature of the use to which the machinery was subjected and the cause of the fracture of the cap screw should have been reasonably indicated in the testimony." 20 F. 2d at 319.

She also quotes (Petition, p. 27) the following statement from the opinion in *Kahn* v. *Chrysler Corporation* (D. C. S. D. Tex. 1963), 221 F. Supp. 677, 679:

> "The duty of the automobile manufacturer extends to the ordinary use of the vehicle, and may even be such as to cover certain situations when the automobile is being negligently used."

But she does not disclose that in *Kahn* the suit was on behalf of a minor who drove his bicycle into the rear of an automobile, striking his temple against a sharp and protruding fin on the rear of the vehicle, and that the court *granted summary judgment for defendant* stating that, as a matter of law, automobile manufacturers—

> ". . . should not be required to anticipate all the possible ways in which a person may injure himself by falling against an automobile, nor should they have a duty to protect against such possible injuries."

And, finally, plaintiff quotes (Petition, p. 27), the following statement from the opinion in *Hardman* v. *Helene Curtis Industries, Inc.* (Ill. App. 1964), 198 N. E. 2d 681, 691:

> ". . . the question of ordinary use is as much a question of fact as is the question of what is a foreseeable use."

But she does not disclose that the product involved in *Hardman* was a hair spray which the plaintiff, a six year old child, had used in large amounts on her hair and dress which later ignited while the child was carrying a lighted candle, and that there was no warning on the can that the hair spray was flammable. The duty imposed upon the manufacturer in *Hardman* was not to make a hair spray which would furnish a user reasonable protection from fire, or even to make a non-inflammable hair spray, but simply a duty to warn users about dangers inherent in a use of the product which were not readily apparent.

There is, therefore, but one possible conclusion from *all* the authorities—that *as a matter of law* defendant's duty to plaintiff's husband did not include a duty to design the 1961 Model Chevrolet so as to protect him from injury or death in the collision in which he was killed.

The situation is not changed one whit by the fact that Ford had put a frame with side rails in some (but not all) of its automobiles and had ambiguously claimed that such frame was stronger than the "X" frame (Petition, p. 7), nor by the fact that defendant itself was building Oldsmobiles with frames having side rails and had itself noted that such frames furnished protection from impacts on the side. (Petition, p. 9.) And the same is true notwithstanding all the so-called "admission" of duty and "recognitions" of defect by defendant which plaintiff believes is shown by the extraneous materials which she would have offered as

evidence at the trial. (Petition, pp. 8-12; 20-22.) These are the only "authorities" upon which plaintiff replies, but they are not legal authorities in any sense of the word.

A manufacturer's duty is created by *law,* not by any or all of the things relied on by plaintiff. If it were the law that defendant owed plaintiff's husband a duty to protect him from the forces which killed him, then some of the things upon which plaintiff relies might properly be considered—at trial—in determining whether defendant had fulfilled or breached said duty. But those things separately or together, cannot create a duty if none exists in law.

In *Ein* v. *Goodyear Tire and Rubber Co.* (D. C. N. D. Ind. 1959), 173 F. Supp. 497, a tire manufacturer was claimed to have been negligent in making tires of different qualities and in failing to warn the public of those differences. In holding the claim deficient as a matter of law, the court stated:

> "What plaintiffs seem to claim is that since they allege a tubeless tire is more susceptible to blowouts following a bruise than are tires with tubes, and since it is also alleged that defendant was more aware of this fact than the public generally, it was defendant's duty to warn buyers and others about this feature of tubeless tires . . .
>
> "While there may be a difference in the wearing qualities between two types of tires, such as claimed in this case, a manufacturer has no duty, in my opinion, to call the difference to the attention of the buyer or the public generally. In other words, the manufacturer need not anticipate or foresee that his customers will erroneously assume that the two types of tires are of the same quality. It must be concluded that liability cannot be predicated upon plaintiff's theory of negligence." 173 F. Supp. at 498.

See also, *Wigmore on Evidence* (3d Ed.) § 461:

> "* * * *the substantive law* tells them (the jury) what

> the *standard of conduct for negligence is;* and this standard is a fixed one, independent of the actual conduct of others. To take that conduct as furnishing a sufficient legal standard of negligence would be to abandon the standard set by the substantive law and would be improper." (Emphasis added.)

And *Johnson* v. *Murray Co.* (Tex. 1936), 90 S. W. 2d 920, 926:

> "However, negligence for use of a dangerous plan or design cannot be predicated alone upon the fact that other manufacturers of the same kind of machinery constructed or made it differently."

Plaintiff and the dissenting judge below obviously believe that automobile collisions have become so common that automobile manufacturers should be placed in a category apart from other manufacturers. But if this is to be done, it must be done by the legislature, not the judiciary by rewriting the common law. As noted in the majority opinion below:

> "Perhaps it would be desirable to require manufacturers to construct automobiles in which it would be safe to collide, but that would be a legislative function, not an aspect of judicial interpretation of *existing* law." (Petition, Appendix A, p. 38.) (Emphasis added.)

If manufacturers of automobiles are to be made liable for failing to prevent injury from collisions, regardless of their cause, the legislature must make them insurers. If it is to be something less than this ("safer" cars), the legislature must fix the standards (as, for example, the recent seat belt statutes). Courts and juries are not equipped to fix such standards in each case on the basis of what may or may not, by use of hindsight, have appeared to have been "safer". Here, it is claimed that reasonable care requires an automobile to be equipped with a side frame,

evidently because plaintiff believes (but has not alleged) that the automobile which struck the station wagon driven by her husband would have struck such a frame and the violence of the impacting force might have been lessened and therefore her husband would not have been killed but only injured. Next, when an automobile with such a frame is struck *too hard,* or *above such frame,* the claim will be that the frame should have been thicker or taller, until eventually only Sherman tanks can be built. Then the charge might very well be that such an impenetrable construction absorbs none of the energy in an impact and the occupants are much less safe. See *Hatch* v. *Ford Motor Company* (Calif. 1958), 329 P. 2d 605, 607-8.

The point is, "safer" is no standard at all. The instant complaint is a perfect example of this. Plaintiff does not say that a side frame in the station wagon would have probably or even possibly *prevented* her husband's death, or that the side frames in the other automobiles allegedly using them to any great or even small extent *prevent* drivers from being killed. The *only* claim is that such a frame would have "*afforded added protection* from injury and/or death." How much protection, and whether it would have been enough in this collision, is left to speculation.

If courts are to impose upon automobile manufacturers the duty as claimed by plaintiff, how are juries to be instructed? What is the duty? To provide safe cars? An insurer's duty? If not, if only reasonable protection, under what circumstances does the duty arise? When a competitor *claims* to have made a safer car? Or when someone *criticizes* a manufacturer's product as not being as safe as another? And how could juries be prevented from imposing an insurer's liability, or from basing a verdict on pure speculation and hindsight or from applying their own notions as to how an automobile should be built with the knowledge that some day they may be involved in a col-

lision and would like to be protected in this fashion or that fashion?

These are not mere abstract questions. They are part and parcel of plaintiff's unusual claim and they are unanswerable except by appropriate legislation. Moreover, they demonstrate that plaintiff's plea, at pages 32-33 of her petition, that the history of the common law is one of growth, and that

> "The goal of safe cars of the unreasonableness of the design of the instant automobile cannot be left *solely* to legislative action. Courts have a responsibility *to protect consumers under existing laws* and to *interpret* Indiana law." (Emphasis added)

is nothing more than an invitation to this Court to consider whether it should attempt to legislate safe automobiles into existence under the guise of "permitting" the common law to "grow", starting with the common law of Indiana.

What has been said herein as to defendant's alleged design duty applies with equal force to its alleged duty to test its designs. If defendant had a duty to protect drivers of its automobiles from injury in side impact collision, then of course it had a duty to test the design of its automobiles from that standpoint, including one would suppose, from the standpoint of 75 m.p.h. impacts.

But if defendant had no duty to protect drivers from injury in side impact collisions, as heretofore shown, then it had no duty to test the design of its automobiles from that standpoint. There is no duty on a manufacturer to test merely for the purpose of seeing what happens. His duty to test is coextensive with, not broader than, his duty to furnish a product reasonably fit for its intended purpose.

B. The Implied Warranty and Strict Liability Counts.

There are no Indiana decisions by which to measure the legal sufficiency of the implied warranty and strict liability counts of plaintiff's amended complaint. As yet no Indiana appellate court has been asked to decide whether a manufacturer may be sued for breach of implied warranty by one not in privity of contract with such manufacturer, or whether Indiana will adopt or reject the strict liability doctrine as set forth in § 402A of the Restatement of the Law of Torts, Second.

Nevertheless, it is perfectly obvious that if the negligence count of plaintiff's complaint was properly dismissed, then the implied warranty and strict liability counts were also properly dismissed for precisely the same reason—no duty on which to base a claim of breach of implied warranty or a claim of a dangerously defective condition.

If defendant, as a matter of law, was not required to design its automobiles so as to protect drivers from injury in side impact collisions, then it necessarily follows that defendant, as a matter of law, did not impliedly warrant that its automobiles would protect drivers in such collisions, and that the automobile here in question, as a matter of law, was not dangerously defective merely because it was not designed with side rails which might conceivably have furnished plaintiff's husband with "added" protection in the side impact collision in which he was involved.

As noted by the court in *Henningsen* v. *Blomfield Motors, Inc.* (N. J. 1960), 161 A. 2d 69, 76, implied warranty "simply means that the thing sold is reasonably fit *for the general purpose for which it is manufactured and sold.*" (Emphasis added.) Thus implied warranty, like negligence, requires *duty*—the *same* duty.

The same is true with respect to strict liability. Section 402A of the Restatement of the Law of Torts, Second provides:

> "§402A. Special Liability of Seller of Product for Physical Harm to User or Consumer.
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) The user or consumer has not bought the product from or entered into any contractual relation with seller.

but Comment (h) to such section of the Restatement plainly states that:

> "A product is not in a defective condition when it is safe for normal handling."

and Comment (i) states that before a manufacturer can be liable under § 402A "the article sold must be dangerous to an extent *beyond* that which would be contemplated by ordinary users who purchase it with the ordinary knowledge common of the community as to its characteristics." (Emphasis added.)

Plaintiff makes no claim in her petition that her implied warranty and strict liability counts stand on any different footing than her negligence counts.

Her only arguments are (1) that she has found no

Indiana decision which would deny recovery to her under such theories (obviously, since there are no Indiana decisions either way), and (2) that the decision of the court below in affirming the dismissal of such counts is contrary to other decisions in the same circuit, an argument already shown herein (*supra,* p. 12) to be completely without merit.

CONCLUSION.

The court below correctly applied applicable state law to the complaint before it. Plaintiff's claim that an automobile manufacturer may be held responsible for injuries and deaths which its automobiles merely *permit* to happen to users is completely beyond the pale of the manufacturer's duty under Indiana law.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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